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Hargreaves, In re (1890) 44 Ch. D. 236
Distinguished. *In re* Manners. Public Trustee *v.* Manners **C. A. 613**

Harold Wood Brick Co., Ld. v. *Ferris* [1935] 2 K. B. 198.
Applied. Thorpe *v.* Fasey **Wynn-Parry J. 649**

Harper, In re - - - [1914] 1 Ch. 70
Considered. *In re* Jeeves. Morris-Williams *v.* Haylett **Vaisey J. 49**

Harwood and Bincks v. *Hilliard* (1677) 2 Mod. Rep. 268.
Followed. Kennewell *v.* Dye **Roxburgh J. 517**

Hatch v. *Hatch* - - [1919] 1 Ch. 351
Referred to. Whiteside *v.* Whiteside - - **Harman J. 448**

Hill v. *Crook* - (1873) L. R. 6 H. L. 265
Followed and applied. *In re* Wohlgemuth, Public Trustee *v.* Wohlgemuth and Another **Jenkins J. 12**

Hill v. *Crook* - (1873) L. R. 6 H. L. 265
Applied. *In re* Fletcher decd. Barclays Bank Ld. *v.* Ewing **Roxburgh J. 473**

Hill v. *Permanent Trustee Co. of New South Wales* [1930] A. C. 720.
Referred to. Harrison's Will Trusts, *In re*. Harrison's Settlement, *In re*. Harrison *v.* Milburne-Swinnerton-Pilkington - - **Roxburgh J. 678**

Hilton v. *Green and Others* (1862) 2 F. & F. 821
Considered and applied. Seligman *v.* Docker - **Romer J. 53**

Hoare & Co., In re (1933) 150 L. T. 374
Applied. *In re* Press Caps, Ld. **C. A. 434**

Hobourn Aero Components, Ld., In re [1946] Ch. 194.
Discussed. Gibson *v.* South American Stores (Gath and Chaves), Ld. - **Harman J. 572**

Horlock v. *Wiggins* (1888) 13 Ch. D. 142
Applied. *In re* Manners. Public Trustee *v.* Manners **C. A. 613**

Hoystead v. *Commissioner of Taxation* [1926] A. C. 155
Considered. *In re* Koenigsberg. Public Trustee *v.* Koenigsberg **C. A. 348**

Hunt v. *Silk* - (1804) 5 East 449
Applied. Thorpe *v.* Fasey **Wynn-Parry J. 649**

Iron Trades Employers Insurance Association, Ld. v. *Union Land and House Investors, Ld.* [1937] Ch. 313.
Considered. Dudley and District Benefit Building Society *v.* Emerson - - - **C. A. 707**

Irvine v. *Sullivan* (1869) L. R. 8 Eq. 673
Considered. Rees' Will Trusts, *In re*. Williams *v.* Hopkins **Vaisey J. 541**

Jackson v. *Stopford* - [1923] 2 I. R. 1.
Referred to. Whiteside *v.* Whiteside - - **Harman J. 448**

Jacques, In re - - [1903] 1 Ch. 267
Considered and applied. *In re* George's Will Trusts. Barclays Bank Ld. *v.* George **Jenkins J. 154**

Jarrett v. *Barclays Bank Ld.* [1947] Ch. 187
Applied. *In re* A Debtor. *Ex parte* The Debtor *v.* Dodwell (The Trustee) - **Harman J. 236**

Tollet v. *Tollet* - (1728) 2 Peere Wms. 489
Considered. *In re* Hambro's Marriage Settlements. Hambro *v.* Hambro - - **C. A. 484**

Trehearne, In re. Ex parte Chief Official Receiver v. *Ealing Local Board* (1890) 63 L. T. 323; 6 T. L. R. 488
Considered. George *v.* Tompson's Trustee **Wynn-Parry J. 322**

Tussaud's Estate, In re - (1878) 9 Ch. D. 363
Considered and applied. *In re* George's Will Trusts. Barclays Bank Ld. *v.* George **Jenkins J. 154**

Twycross v. *Dreyfus* - (1877) 5 Ch. D. 605
Referred to. Dollfus Mieg et Cie, S.A. *v.* Bank of England **Jenkins J. 369**

Van der Linde v. *Van der Linde* [1947] Ch. 306
Referred to. Whiteside *v.* Whiteside - - **Harman J. 448**

Vaux, In re - - - [1939] Ch. 465
Applied. *In re* George's Will Trusts. Barclays Bank Ld. *v.* George - - **Jenkins J. 154**

Vickers, In re - - (1888) 37 Ch. D. 525
Considered. *In re* George's Will Trusts. Barclays Bank Ld. *v.* George - - **Jenkins J. 154**

Walbran, In re - [1906] 1 Ch. 64
Considered. *In re* Jeeves. Morris-Williams *v.* Haylett **Vaisey J. 40**

Ward v. *Van der Loeff* - [1924] A. C. 653
Distinguished. *In re* Wohlgemuth. Public Trustee *v.* Wohlgemuth and Others - **Jenkins J. 12**

Ward's Will Trusts, In re [1936] Ch. 704
Disapproved. *In re* Harrison's Will Trusts. *In re* Harrison's Settlement. Harrison *v.* Milburne-Swinnerton-Pilkington - **Roxburgh J. 678**

Waring, In re (No. 2) - [1948] Ch. 221
Distinguished. *In re* Koenigsberg. Public Trustee *v.* Koenigsberg **C. A. 348**

Wedgewood, In re - - [1921] 1 Ch. 601
Applied. *In re* Shepherd decd. Public Trustee *v.* Henderson and Others - **Harman J. 116**

Wellsted's Will Trust, In re. Wellsted v. *Hanson* [1948] Ch. 610.
Reversed - - **C. A. 296**

West Lancs R. D. C. v. *Lancashire and Yorkshire Ry. Co.* [1903] 2 K. B. 394.
Considered. The Railway Executive (formerly the London and North Eastern Railway Co.) *v.* West Riding of York County Council - - - **C. A. 423**

White v. *Grand Hotel, Eastbourne, Ld.* [1913] 1 Ch. 113.
Applied. Kain *v.* Norfolk **Jenkins J. 163**

Wightman, Re, Bradbury v. *Cambridge University* [1947] 2 All E. R. 647.
Distinguished. *In re* Haynes' Will Trusts. Pitt *v.* Haynes **Roxburgh J. 5**

Williams' Trustees v. *Inland Revenue Commissioners* [1947] A. C. 447.
Applied. *In re* Strakosch decd. Temperley *v.* Attorney-General **C. A. 529**

Winn, In re - - - [1916] W. N. 366
Not followed. *In re* Davidson decd. National Provincial Bank Ld. *v.* Davidson **Roxburgh J. 670**

Wohlgemuth, In re - [1949] 1 Ch. 12
Followed. *In re* Fletcher decd. Barclays Bank Ld. *v.* Ewing **Roxburgh J. 473**

Young, In re - - [1913] 1 Ch. 272
Followed. *In re* Cranstoun decd. Gibbs *v.* Home of Rest for Horses - - **Romer J. 523**

STATUTES JUDICIALLY CONSIDERED

1845

Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, *c.* 20), *s.* 16. The Railway Executive (formerly The London & North Eastern Railway Company) *v.* West Riding of York County Council **C. A. 423**

1850

South Yorkshire, Doncaster, and Goole Railway (Deviation and Extension of Elsecar Branch) Act, 1850 (13 & 14 *Vict.*, *c.* xxxv), *ss.* 3, 8, 13. The Railway Executive (formerly the London and North Eastern Railway Company) *v.* West Riding of York County Council - - **C. A. 423**

1886

Guardianship of Infants Act, 1886 (49 & 50 *Vict.*, *c.* 27), *s.* 5. *In re* Guardianship of Infants Acts, 1886 and 1925, and *In re* S. B. an Infant. B. *v.* B. - - **Vaisey J. 108**

1894

Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 8 *Re* Barnato decd. Joel *v.* Sanges - - **Harman J. 21**
C. A. 258

1895

Summary Jurisdiction (Married Women) Act 1895 (58 & 59 *Vict.*, *c.* 39), *s.* 9. *In re* Bidie decd. Bidie *v.* General Accident Fire and Life Assurance Corporation Ld. **C. A. 121**

1914

Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 29. *In re* Harry Dunn. *Ex parte* The Official Receiver *v.* Harry Dunn - **C. A. 640**

—— —— *s.* 40, *sub-ss.* 1, 2; *s.* 41, *sub-s.* 1. George *v.* Tompson's Trustee **Wynn-Parry J. 322**

—— —— *ss.* 80, 105. *In re* a Debtor. *Ex parte* The Debtor *v.* Dodwell (The Trustee) **Harman J. 236**

1918

Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *General Rules*, *r.* 23, *sub-r.* 2. Whiteside *v.* Whiteside **Harman J. 448**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*) *and* (*g*). Dudley and District Benefit Building Society *v.* Emerson **C. A. 707**

1925

Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 79. *In re* Scholfield's Will Trusts. Scholfield *v.* Scholfield - - - **Romer. J 341**

Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 20, *sub-s.* 1. *In re* Scholfield's Will Trusts. Scholfield *v.* Scholfield **Romer J. 341**

Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 1. Wellsted's Will Trusts, *In re.* Wellsted *v.* Hanson - - - **C. A. 296**

—— —— *s.* 99, *sub-s.* 1. Dudley and District Benefit Building Society *v.* Emerson **C. A. 707**

—— —— *s.* 146, *sub-s.* 1. Hoffman *v.* Fineberg - **Harman J. 245**

—— —— *s.* 146, *sub-ss.* 2, 4. Creery *v.* Summersell and Flowerdew & Co., Ld. Flowerdew & Co., Ld. *v.* Summersell (Third Party) **Harman J. 751**

Guardianship of Infants Act, 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7. *In re* Guardianship of Infants Acts, 1886 and 1925, and *In re* S. B. an Infant. B. *v.* B. - - **Vaisey J. 108**

1926

Adoption of Children Act, 1926 (16 & 17 *Geo.* 5, *c.* 29). *In re* D. X. (an Infant) - - **Vaisey J. 320**

—— —— *s.* 5, *sub-s.* 2. *In re* Fletcher decd. Barclays Bank Ld. *v.* Ewing - - **Roxburgh J. 473**

1929

Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 63. *In re* Greene decd. Greene *v.* Greene - **Harman J. 333**

1932

Town and Country Planning Act, 1932 (22 & 23 *Geo.* 5, *c.* 48), *ss.* 10, 34. Ransom & Luck Ld. *v.* Surbiton Borough Council **C. A. 180**

—— —— *s.* 10, *sub-s.* 6. Epsom and Ewell Corporation *v.* Streatham Property Investment Limited **Vaisey J. 38**

1933

London Passenger Transport Act, 1933 (23 *Geo.* 5, *c.* 14). Smith *v.* London Transport Executive **C. A. 685**

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sch.* 1. Dudley and District Benefit Building Society *v.* Emerson **C. A. 707**

Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 3. *Re* Barnato, decd. Joel *v.* Sanges **Harman J. 21**

1935

Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 2, *sub-s.* 2. *In re* Heath's Will's Trusts. Hamilton *v.* Lloyds Bank Limited **Harman J. 170**

1937

Coal (Registration of Ownership) Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 52), *s.* 1, *sub-s.* 1. *In re* Trusts affecting Compensation Moneys in respect of Coal Holdings. Public Trustee *v.* Manchester Corporation - - **Danckwerts J. 737**

1938

Coal Act, 1938 (1 & 2 *Geo.* 6, *c.* 52), *ss.* 6, 7, 39; *sch. III.*, *Part* 4, *paras.* 18 (*c*), 21, 22. *In re* Trusts affecting Compensation Moneys in respect of Coal Holdings. Public Trustee *v.* Manchester Corporation - - **Danckwerts J. 737**

—— —— *sch. III.*, *Part IV.*, *para.* 21 (2). Williams *v.* Sharpe **C. A. 595**

Inheritance (Family Provision) Act, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 1, *sub-ss.* 1, 6, 7. *In re* Borthwick decd. Borthwick *v.* Beauvais **Harman J. 395**

—— —— *s.* 1, *sub-s.* 7: *s.* 2, *sub-s.* 1. *In re* Searle decd. Searle *v.* Siems and Others **Roxburgh J. 73**

—— —— *s.* 2, *sub-s.* 1. *In re* Bidie decd. *v.* General Accident Fire and Life Assurance Corporation Limited **C. A. 121**

Trade Marks Act, 1938 (1 & 2 *Geo.* 6, *c.* 22), *s.* 26, *sub-s.* 1 (*b*), *sub-s.* 3. Aktiebolaget Manus *v.* R. J. Fullwood & Bland, Limited - **C. A. 208**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 2; *s.* 19, *sub-ss.* 1 (*b*), 2. *In re* Howlett (William Henry), decd. and *In re* Howlett (Ada Amelia), decd. Howlett *v.* Howlett - **Danckwerts J. 767**

Compensation (Defence) Act, 1939 (2 & 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*b*). *In re* Thompson, decd. Westminster Bank, Limited *v.* Thompson and Others - - **Harman J. 1**

—— —— *s.* 2, *sub-s.* 1 (*b*). *In re* Armitage's Contract. Armitage *v.* Inkpen **Vaisey J. 666**

1940

Finance Act, 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 43. *Re* Barnato, decd. Joel *v.* Sanges **Harman J. 21** **C. A. 258**

—— (2 & 3 *Geo.* 6, *c.* 29), *s.* 50, *sub-s.* 1; *s.* 55, *sub-s.* 2. *In re* Duffy. Lakeman *v.* Attorney-General **C. A. 28**

1943

War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 6, *sub-s.* 2. *In re* St. Luke's Hospital, Chelsea, London **C. A. 459**

—— —— *s.* 10, *sch. II.*, *paras.* 1, 2. *In re* City of London Property Co., Ld.'s Appeal **Vaisey J. 581**

—— —— *s.* 10, *sub-ss.* 1, 2. *In re* Scholfield's Will Trusts. Scholfield *v.* Scholfield **Romer J. 341**

Town and Country Planning (Interim Development) Act, 1943 (6 & 7 *Geo.* 6, *c.* 29), *s.* 4. Ransom & Luck, Ld. *v.* Surbiton Borough Council - - - **C. A. 180**

1946

Coal Industry Nationalisation Act, 1946 (9 & 10 *Geo.* 6, *c.* 59), *s.* 22, *sub-s.* 3 (*c*). New Rock Colliery Co., Ld. *v.* Ministry of Fuel and Power - - **Vaisey J. 403**

National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81), *s.* 6, *sub-s.* 1; *s.* 7, *sub-ss.* 1, 10; *s.* 60, *sub-s.* 1. *In re* Kellner's Will Trusts. *In re* National Health Service Act, 1946. Blundell *v.* Royal Cancer Hospital - **Harman J. 509**

1947

Finance Act, 1947 (10 & 11 *Geo.* 6, *c.* 35), *s.* 49. *In re* Shepherd, decd. Public Trustee *v.* Henderson and Others **Harman J. 116**

Crown Proceedings Act, 1947 (10 & 11 *Geo.* 6, *c.* 44), *ss.* 1, 13, 17, *sub-s.* 3, 23. *Re* Barnato, decd. Joel *v.* Sanges - - **Harman J. 21** **C. A. 258**

—— —— *s.* 21. Sebel Products, Ld. *v.* Commissioners of Customs and Excise - - **Vaisey J. 409**

Transport Act, 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1, *s.* 12, *s.* 14, *sub-s.* 4, *s.* 65, *sub-s.* 1. Smith *v.* London Transport Executive **C. A. 685**

1948

Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 101. *In re* Kris Cruisers, Ld. **Vaisey J. 138**

—— —— *s.* 209. *In re* Press Caps, Ld. **C. A. 434**

RULES AND ORDERS JUDICIALLY CONSIDERED

S. C. *Or.* 1A, *r.* 1 (*a*), (*b*). *Re* BARNATO, DECD. JOEL *v.* SANGES **Harman J. 21** **C. A. 258**

—— *Or.* 16, *r.* 11. *Re* BARNATO, DECD. JOEL *v.* SANGES **Harman J. 21** **C. A. 258**

—— *Or.* 54A, *r.* 1A. *Re* BARNATO DECD. JOEL *v.* SANGES **Harman J. 21**

—— *Or.* 54F, *r.* 2. *In re* SEARLE, DECD. SEARLE *v.* SIEMS AND OTHERS **Roxburgh J. 73**

—— *Or.* 55, *rr.* 3, 5. *Re* BARNATO, DECD. JOEL *v.* SANGES **Harman J. 21** **C. A. 258**

—— *Or.* 55, *r.* 5A. ALLIANCE BUILDING SOCIETY *v.* VARMA **C. A. 724**

—— *Or.* 70, *r.* 2. *In re* SEARLE, DECD. SEARLE *v.* SIEMS AND OTHERS **Roxburgh J. 73**

ERRATA

In re St. Luke's Hospital, Chelsea, London, p. 459. At p. 472, for "Appeal "allowed" read "Appeal dismissed."

Squire v. *Squire* [1949] P. 51. Page 69 line 8: for "even" read "infrequently."

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re THOMPSON, DECD.

WESTMINSTER BANK, LIMITED *v.* THOMPSON AND OTHERS.

HARMAN J.

1948

June 16.

Emergency legislation—Compensation paid on derequisitioning—Settled property—Whether capital or income—Compensation (Defence) Act, 1939 (2 & 3 *Geo.* 6, *c.* 75), *s.* 2 (1) (*b*).

Compensation payable under s. 2, sub-s. 1 (*b*) of the Compensation (Defence) Act, 1939, on the derequisitioning of leasehold property held on trust for sale, should be treated as capital and not income. It is in fact compensation for damage to the inheritance done by the occupation of the Crown, and can be properly described as dilapidations.

ADJOURNED SUMMONS.

The testator, Frederic Willoughby Thompson, made his will on March 12, 1937. He died on January 15, 1938. After bequeathing various legacies, he gave all his real and personal property to his trustees upon trust for sale. He directed them to pay certain annuities, and by cl. 11 of his will he provided: " . . . . I give the whole of my residuary estate including all " the accretions which may fall into it from time to time to " my trustees upon trust to pay the whole annual income " arising from it to my niece Hilda Scott Thompson during " her life . . . ." By cl. 12 he directed: " The whole annual " produce of my residuary estate however invested shall be " treated as current income and my trustees shall be under

HARMAN J.

1948

THOMPSON, DECD., *In re.* WESTMINSTER BANK, LD. *v.* THOMPSON.

"no obligation to capitalize any part thereof nor to call in "or sell any investments of a speculative reversionary or "depreciating nature whether producing income or not and "in particular they may retain my Tottenham Court Road "leases for so long as they shall in their discretion think fit "and even until they expire." On the death of the tenant for life he directed that the annuities should be increased, and that the capital and income should be paid to certain named charities.

During the war part of the Tottenham Court Road property was requisitioned by the Ministry of Supply. The property was derequisitioned in 1946, and 400*l.* was paid to the trustees as compensation under s. 2, sub-s. 1 (*b*) of the Compensation (Defence) Act, 1939, (1). A summons was taken out to determine questions arising under the will, and in particular whether the said sum of 400*l.* ought to be treated as capital, or whether the same or any part thereof ought to be applied as income.

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(1) The Compensation (Defence) Act, 1939, s. 2, sub-s. 1: "The "compensation payable under this "Act in respect of the taking "possession of any land shall be "the aggregate of the following "sums, that is to say,—(*a*) a sum "equal to the rent which might "reasonably be expected to be "payable by a tenant in occupation of the land, during the "period for which possession of "the land is retained in the exercise of emergency powers, under "a lease granted immediately "before the beginning of that "period, whereby the tenant "undertook to pay all usual "tenant's rates and taxes and to "bear the cost of the repairs and "insurance and the other expenses, if any, necessary to "maintain the land in a state to "command that rent, and (*b*) a "sum equal to the cost of making "good any damage to the land "which may have occurred during "the period for which possession "thereof is so retained . . . . no "account being taken of fair wear "and tear or of damage caused "by war operations . . . ."

Sub-s. 2: "Any compensation "under paragraph (*a*) of the "preceding subsection shall be "considered as accruing due from "day to day during the period for "which the possession of the land "is taken in the exercise of emergency powers . . . . and shall "be paid to the person who for the "time being would be entitled to "occupy the land but for the fact "that possession thereof is retained in the exercise of such "powers . . . ."

Sub-s. 3: "Any compensation under paragraph (*b*) "of subsection (1) of this section "shall accrue due at the end of the "period for which possession of "the land is retained in the exercise of emergency powers, and "shall be paid to the person who "is then the owner of the land."

S. 17: "'owner' means— "(*a*) in relation to land, the person "who is receiving the rackrent of "the land, whether on his own "account or as agent or trustee "for any other person, or who "would so receive the rackrent of "the land if it were let at a rack-"rent . . . ."

Wilfrid Hunt for the trustees.

E. I. Goulding for the tenant for life of the residuary estate. The Compensation (Defence) Act, 1939, provides "compensa-" tion in respect of the taking possession of any land." Prima facie this belongs beneficially to the person for the time being entitled to the fruits of possession, i.e., the tenant for life of the land, or of the proceeds of sale thereof. The fact that payments in compromise of liabilities under covenant are treated as capital does not affect the position under s. 2, sub-s. 1 (*b*). The sums calculated under the several paragraphs of sub-s. 1 of s. 2 of the Act do not differ for this purpose. The opening words of the section give a single kind of compensation, which is defined as "the aggregate" of those sums. The combined effect of sub-s. 3 of s. 2 and the definition of "owner" in s. 17 is to give the character of income to payments under para. (*b*) of sub-s. 1 of s. 2. It is in a sense additional rent, since the Crown pays the rent of a notional repairing lease, which is a lower rental than a non-repairing lease, and this sum could, in fact, have been expended on repairs during the Crown's occupation.

Sargant J. held in *In re Williams' Settlement* (1) that damage to the inheritance done by the occupation of the Crown should go to the tenant for life; accordingly the 400*l.* should be paid to the life tenant Had the Act intended an apportionment, it would have said so, as in s. 13.

R. E. Megarry for other defendants interested under the will. Reference to the judgment of Sargant J. in *In re Williams' Settlement* (1) was stopped too soon, as Sargant J. said in the paragraph following that the money received from the military authorities for the damage done was a casual profit. What the will gives in the present case is merely the "annual produce." Further *In re Pyke* (2) draws a firm distinction between a tenant for life of settled land, who receives casual profits and a life tenant under a trust for sale, who merely receives the "produce" of the estate. It is for the life tenant to show that these "casual profits" fall squarely within the words of the gift in the will, but there is nothing in this will to justify that assumption. The argument advanced on the construction of the Act is unsound. Sub-s. 2 of

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(1) [1922] 2 Ch. 750, 757. (2) [1912] 1 Ch. 770.

s. 2 provides that payments under s. 2, sub-s. 1 (*a*) accrue from day to day and they should be paid to the tenant for life, whereas sub-s. 3 of s. 2 says that payments under s. 2, sub-s. 1 (*b*), are a lump sum payable to the owner of the land at the date of derequisition. The Act made it clear therefore that there should not be an aggregation in the sense suggested, and this sum should be treated as capital.

A. C. Nesbitt for the North London or University College Hospital, interested in corpus. Prima facie compensation would be payable in respect of damage to the inheritance done by the occupation of the Crown. It is, in effect, payment in respect of capital depreciation, unless the language of the section under which it is paid provides the contrary. There is nothing in the wording of s. 2, sub-s. 1 (*b*), which displaces this prima facie view. The 400*l.* is really dilapidations and should be treated as capital.

HARMAN J. Although it is conceded on behalf of the equitable tenant for life that a sum received from the lessees, or sub-lessees as the case may be, by way of compromise of their liabilities under a covenant, should be treated as capital, it is contended that this sum is income. This contention is based on the words of s. 2, sub-s. 1 (*b*), of the Compensation (Defence) Act, 1939, under which this sum has been paid.

The argument is this: first that compensation is one thing, consisting of the aggregate the sums paid under paras. (*a*) and (*b*) of sub-s. 1 of s. 2, and both the one and the other ought to go in the same direction; and, secondly, that the rent which the Crown has been paying, has been rent, presumably by so much the less, that the notional tenant was supposed to bear the costs of repair, and, therefore, the 400*l.* is merely the difference between what would have been paid under a repairing lease and under a non-repairing lease, and is in the nature of additional rent.

I do not think the tenant for life can succeed here: first because she must show that this money can be properly described as the annual produce of the residuary estate. It is apparent from s. 2, sub-s. 2, of the Act that whereas compensation payable under s. 2, sub-s. 1 (*a*), accrues from day to day, compensation under para. (*b*) of that sub-section does not accrue until the end of the period. Therefore I do not think the latter is income to which the quasi tenant for life is entitled. Furthermore I think that the compensation here in question can be properly described as dilapidations. It is, in effect, compensation for damage to the inheritance which has been done by the occupation by the Crown. That being so, there is no more reason why it should not be treated as capital, than the compensation payable by the sub-tenant of the property, which admittedly must go to the inheritance. I, therefore, decide that this 400*l*. is capital.

Declaration accordingly.

Solicitors for all parties except the fifteenth defendant: *Hilder, Thompson & Dunn.*

Solicitors for the fifteenth defendant: *Pennington & Son.*

I. G. R. M.

In re HAYNES WILL TRUSTS.
PITT *v.* HAYNES.

ROXBURGH J.
1948
June 16; *July* 2.

Will — Construction — Forfeiture on alienation — Beneficiary's marriage settlement—Covenant to transfer part of interest under will to settlement trustees—Equitable assignment—Effect of forfeiture clause.

The testator W. H. by his will, dated August 11, 1882, directed his trustees to hold his residuary estate for all his children living at his death who being sons attained the age of twenty-one years, but so that "if such son shall at the . . . . time of distribution "have been or be outlawed or a bankrupt or have done or suffered "anything whereby his said share in my said residuary estate would "through his act or by operation or process of law or otherwise "if belonging absolutely to him have become vested in or payable "to some other person" certain other dispositions should take effect. The testator died on September 19, 1884. One of his sons, T. H. H., on April 17, 1888, entered into a marriage settlement whereby he covenanted "when the share in the residuary estate "of [W. H.] to which he . . . . may become entitled at the "time of distribution . . . . shall have been paid or transferred "to him . . . . forthwith [to] pay or transfer one-third part of "such share" to the settlement trustees.

Held (1.) that the covenant in the marriage settlement, on its true construction, was tantamount to an equitable assignment of part of the interest of T. H. H. under the will; (2.) that although

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

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the forfeiture clause did not contain words providing that the beneficiary's interest should be forfeited if " any part thereof" should become vested in another person, those words had to be supplied by necessary implication ; (3.) that by his covenant in the marriage settlement T. H. H. had brought into operation the forfeiture clause attached to his interest under the will.

In re Gillott's Settlement ; Chattock v. *Reid* [1934] Ch. 97 and *In re Dennis's Settlement Trusts ; Dennis* v. *Dennis* [1942] Ch. 283 followed ; *In re Brewer's Settlement; Morton* v. *Blackmore* [1896] 2 Ch. 503, *Re Wightman ; Bradbury* v. *Cambridge University* [1947] 2 All E.R. 647, note. and *Frænkel* v. *Whitty* [1948] Ch. 55 distinguished.

ADJOURNED SUMMONS.

William Haynes made his will on August 11, 1882, and died on September 19, 1884. By his will he declared that his trustees should stand possessed of his residuary estate in trust for all his children living at his death or born in due time afterwards who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and if more than one in equal shares, but so nevertheless that the share of each such child should be held and applied upon the trusts and with and subject to the powers, provisoes and declarations thereinafter declared of and concerning the same. He further directed and declared that his " said trustees and trustee shall hold the share " in my residuary estate of each son of mine upon trust if " such son shall not at the failure or expiration of the aforesaid " trust for payment of the said mortgages and incumbrances " (herein referred to as the time of distribution) have been " or be outlawed or a bankrupt or have done or suffered " anything whereby his share in my said residuary estate " would through his act or default or by operation or process " of law or otherwise if belonging absolutely to him have " become vested in or become payable to some other person or " persons to pay and transfer the share of such son to him for " his own absolute use and benefit but if such son shall at the " said time of distribution have been or be outlawed or a " bankrupt or have done or suffered anything whereby his " said share in my said residuary estate would through his " act or by operation or process of law or otherwise if belonging " absolutely to him have become vested in or payable to some " other person or persons my said trustees and trustee shall " stand possessed of his said share in my said residuary estate " upon certain other trusts. William Haynes had a son, Thomas

Henry Haynes, who executed a marriage settlement on April 17, 1888. The marriage settlement, after reciting the forfeiture provisions in the will, proceeded as follows: "Now this "Indenture witnesseth that in pursuance of the said agreement "and in consideration of the said intended marriage it is "hereby agreed and declared and the said Thomas Henry "Haynes doth hereby for himself his executors and administrators covenant with the said Charles Edward Haynes and "James Adams Hewitt their executors administrators and "assigns that in case the said intended marriage shall take "place the said Thomas Henry Haynes his executors or "administrators will when the share in the residuary estate of "the said William Haynes deceased to which he or they may "become entitled at the time of distribution referred to in the "said recited will shall have been paid or transferred to him "or them forthwith pay or transfer one-third part of such "share to" the marriage settlement trustees. The trustees of the will asked the court to determine whether, upon the true construction of the said will, Thomas Henry Haynes, in executing the marriage settlement, committed an act whereby the share of the residuary estate of William Haynes bequeathed in trust for him would have become vested in or payable to some other person and thereby suffered a forfeiture of such share.

B. S. Tatham, for the plaintiffs, the trustees of the will.

Goff, R. Cozens-Hardy Horne, E. B. Stamp, for various defendants, beneficiaries under the will other than the children of daughters of Thomas Henry Haynes. Two questions arise for determination by the court: first, whether Thomas Henry Haynes, by executing the covenant in the marriage settlement, brought into operation the forfeiture clause in the will; and secondly, whether the assignment of part of his interest caused a forfeiture although the words "or any part thereof," which are usually found in forfeiture clauses, do not appear in the present clause.

As to the first point, the covenant in the marriage settlement amounted to an equitable assignment in favour of the settlement trustees, who could have specifically enforced the covenant or obtained an injunction. The question is not whether the parties to the marriage settlement intended to create an equitable assignment, but whether they did anything that, in law, brought about an equitable assignment; *In re Gillott's*

Settlement; *Chattock* v. *Reid* (1), per Maugham J. The facts of that case are indistinguishable from the present case.

As to the second point, although it was said in *In re Brewer's Settlement*; *Morton* v. *Blackmore* (2) that normally the court is not at liberty to depart from the language of a forfeiture clause, Farwell J. in *In re Dennis's Settlement Trusts*; *Dennis* v. *Dennis* (3) held that a forfeiture took effect if any part of the interest became vested in or charged in favour of some other person. In that case the words "or any part thereof" were not in the deed, and the material facts were the same as those of the present case. Farwell J. construed the clause as suggested here because the intention of the settlor was so obvious that the words had to be supplied by necessary implication.

[ROXBURGH J. referred to *In re Wightman*; *Bradbury* v. *Cambridge University* (4). The judgment of Romer J. in that case was much longer than the short note of it which is reported.]

The case is nowhere reported at length and we have been unable to obtain a transcript of the judgment. [Counsel also referred to *Adamson* v. *Attorney-General* (5) and *Attorney-General* v. *Lloyds Bank* (6).]

Wigan, for other defendants, the children of daughters of Thomas Henry Haynes. There was no forfeiture. The words in the marriage settlement mean, on their proper construction, that Thomas Henry Haynes had to pay over part of his share in the residue after having received it. Those words were clearly chosen in order to avoid the inference that an equitable assignment was intended. The judgment of Maugham J. in *In re Gillott's Settlement*; *Chattock* v. *Reid* (1) should not be followed, first, because it is not supported by the cases which the learned judge said he followed; *In re Lind* (7) and *In re Spearman* (8); and secondly, because it is contrary to higher or later authorities: *Rodick* v. *Gandell* (9); *Hopkinson* v. *Forster* (10); *Tailby* v. *Official Receiver* (11); *Palmer* v. *Carey* (12); *Fyfe* v. *Garden* (13). These cases make it clear that there is no equitable assignment unless the parties intended one.

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(1) [1934] Ch. 97.
(2) [1896] 2 Ch. 503.
(3) [1942] Ch. 283.
(4) [1947] 2 All E. R. 647, note.
(5) [1933] A. C. 257.
(6) [1935] A. C. 382.
(7) [1915] 2 Ch. 345.
(8) (1900) 82 L. T. 302.
(9) (1852) 1 D. M. & G. 763, 777, 781.
(10) (1879) L. R. 19 Eq. 74, 75.
(11) (1888) 13 App. Cas. 523, 541, 543, 547.
(12) [1926] A. C. 703, 706.
(13) [1946] 1 All E. R. 366, 371.

[ROXBURGH J. Would not the settlement trustees have had an equitable remedy ?]

Only a quia timet injunction, but that does not mean that there was an equitable assignment. They had no interest under the will ; only the beneficiary had an interest.

As to the question whether partial alienation of the beneficiary's interest created a forfeiture, it is admitted that the facts are the same as in *In re Dennis's Settlement Trusts ; Dennis* v. *Dennis* (1). But that case does not qualify the principle of law contained in *In re Brewer's Settlement ; Morton* v. *Blackmore* (2) ; it rests on the construction of the deed of settlement, and, in so far, is not binding on the court.

ROXBURGH J. The question which I have to determine is whether the covenant in the marriage settlement operated as a forfeiture. It is, I think, plain that it was not intended so to operate, but that cannot conclude the matter. The real question must be whether the deed on its true construction was intended to bring about a state of affairs which is in law regarded as an equitable assignment. Fortunately for me the matter has been fully considered by Maugham J. (as he then was) in *In re Gillott's Settlement ; Chattock* v. *Reid* (3), and I find myself quite unable to distinguish the present case from that case on any satisfactory grounds. Mr. Wigan, in an extremely able argument, has drawn my attention to a number of authorities both ancient and modern, high and low, which run close to that case and have been decided in a different manner ; but after considerable hesitation I am satisfied that nothing is contained in any of them which would justify me in saying that *In re Gillott's Settlement ; Chattock* v. *Reid* (3) is a case which I should be entitled to disregard.

That does not, however, conclude the whole matter, because there is not, as will have been observed, in the present forfeiture clause the usual phrase " or any part thereof." I regret to find that I have to accept responsibility for introducing some confusion into this matter. In the case of *Fraenkel* v. *Whitty* (4) where I was dealing with a forfeiture clause which did contain the words " or some part thereof," I observed " If the " words ' or some part thereof ' had been omitted, it would " have been as impossible to argue in this case that all the sums

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(1) [1942] Ch. 283.

(2) [1896] 2 Ch. 503.

(3) [1934] Ch. 97.

(4) [1948] Ch. 55.

"of money vested in the Custodian as it was to argue that the "income of a trust fund vested in him in *Re Wightman*; "*Bradbury* v. *Cambridge University* (1)." That remark of mine was plainly an obiter dictum, because in the case which I had to decide the words "or some part thereof" did occur. When I wrote that judgment I had before me the transcript of Romer J.'s judgment in *In re Wightman*; *Bradbury* v. *Cambridge University* (1), which is very much more extensive than the short note of the decision which is appended to the report in *Fraenkel* v. *Whitty* (2), and I should have been glad if it had been possible to recover that transcript, but it has not proved possible. I do, however, remember quite clearly that the case of *In re Dennis's Settlement Trusts*; *Dennis* v. *Dennis* (3), to which I am about to refer, was not cited either to Romer J., or to myself. There is probably no particular reason why it should have been cited to me, but there was every reason why it should have been cited to Romer J. In *In re Dennis's Settlement Trusts*; *Dennis* v. *Dennis* (3), which contained a forfeiture clause indistinguishable, so far as I can see, from the present clause for this purpose, Farwell J. said this (4): "In my judgment, it is not possible for the court "to supply words in a forfeiture clause in an instrument of this "kind. That seems to be the effect of the judgment in "*In re Brewer's Settlement*; *Morton* v. *Blackmore* (5), of "Chitty J. who said (6): 'In construing clauses of cesser or "'forfeiture such as that before me, the court is not at liberty "'to depart from the language of the document. The words "'"or cease to be payable to himself" are not in the settle-"'ment; and I find myself unable to say that, by any just "'method of construction applicable to such clauses, I ought "'to supply those words.' Therefore, in my opinion, I am "bound to construe the words which are actually used in this "forfeiture clause and not to extend them or to read into the "clause words which are not there. It was contended that, "as the wording of the clause was 'whereby the income of the "'trust funds would, if belonging to the son absolutely, become "'vested in or charged in favour of some other person or "'persons or corporation,' and not 'whereby the income or "'any part thereof,' the clause must be read as though it only "took effect in the event of the whole of the income being

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(1) [1947] 2 All E. R. 647, note.
(2) [1948] Ch. 55.
(3) [1942] Ch. 283.
(4) Ibid. 286.
(5) [1896] 2 Ch. 503.
(6) Ibid. 507.

"vested in or charged in favour of some other person or "persons. I am not able to adopt that view. In my opinion, "it is clearly intended that the forfeiture is to take effect if any "part of the income becomes vested in or charged in favour of "some other person or persons."

I must confess some little difficulty in applying that decision for the following reasons. The words of the forfeiture clause are "but if such son shall at the said time of distribution have "been or be outlawed or a bankrupt or have done or suffered "anything whereby his said share in my residuary estate would "through his act or by operation or process of law or otherwise "if belonging absolutely to him have become vested in or "payable to some other person or persons my said trustees and "trustee shall stand possessed of his said share." It is, I think, common ground that "his said share" there must mean "the "whole of his said share." Therefore, I find some little difficulty in giving a different meaning to the phrase "his said "share" when it occurs shortly before that point, having regard to the principle which Farwell J., recognized and approved, namely, that "in construing clauses of cesser or "forfeiture such as that before me, the court is not at liberty "to depart from the language of the document." It seems to me that the logical manner of arriving at the view that the document was intended to operate when there was an assignment not only of the share but of any part thereof would be to say that the words "or any part thereof" ought to be implied by necessary implication from the tenor of the instrument as a whole; and yet that might appear to be proceeding in a manner not authorized by the principle laid down in *In re Brewer's Settlement, Morton* v. *Blackmore* (1). However that may be, in my judgment, Farwell J.'s decision is indistinguishable; Romer J.'s decision is not fully reported, the whole text of his judgment is not available; it is certain that Farwell J.'s decision was not cited before him; my own observation in *Fraenkel* v. *Whitty* (2) is plainly obiter dictum and, in those circumstances I feel that I ought to follow and apply Farwell J.'s judgment.

Declaration accordingly.

Solicitors: *Pontifex, Pitt & Co.; Church, Rendell, agents for Eastley & Co., Paignton.*

(1) [1896] 2 Ch. 503.
(2) [1948] Ch. 55.

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Oct. 21, 22.

In re WOHLGEMUTH.

PUBLIC TRUSTEE *v.* WOHLGEMUTH AND OTHERS.

Will — Construction — Gift to children of testator and his wife — Children illegitimate—Testator incapable of further issue.

Where a testator, at the date of his will, has illegitimate children only, and is to his own knowledge incapable of having further issue, provisions in the will in favour of his " children " are to be construed as taking effect in favour of the illegitimate children.

A testator who was married but had separated from his wife, cohabited for many years with the defendant N. by whom, in 1921 and 1929, he had two children, the defendants J. and B. In 1935 the wife died, and the testator married N. in January, 1936. By his will, dated May, 1936, the testator appointed N. to be the " guardian of my infant children," and made a number of provisions in favour of " the children of myself and my said wife." At that date the testator was and had for some time been, to his own knowledge, incapable of begetting further offspring. He died in 1942. On a summons being taken out to ascertain whether or not the provisions of the will operated in favour of J. and B.:

Held (1.) that the will, construed by itself, was perfectly appropriate as a will made in favour of after-born legitimate children and there was nothing in the context of the will itself to extend the meaning of the word " children," but

(2.) that evidence was admissible to prove the testator's incapacity and his knowledge thereof at the date of the making of the will, and as those facts were established by the evidence the will must be construed as making provision for the illegitimate children.

Hill v. *Crook* (1873) L. R. 6 H. L. 265 and *In re Eve* [1909] 1 Ch. 796, followed and applied.

Ward v. *Van der Loeff* [1924] A. C. 653, distinguished.

ADJOURNED SUMMONS.

The summons was taken out to ascertain whether certain provisions in the testator's will in favour of his " children " took effect in favour of his illegitimate children. The facts are fully stated in the judgment.

Hubert Rose for the plaintiff.

Wilfrid Hunt for the widow and children. The two exceptions to the rule that the word " children " in a will is to be construed as referring only to legitimate children are stated by Lord Cairns in *Hill* v. *Crook* (1). The second exception is where the will, construed by itself, shows that the

(1) (1873) L. R. 6 H. L. 265, 282.

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testator must have used the word in a wider sense. Here the appointment of the wife as guardian to "my infant children" and the references to the "children of myself and my said "wife" clearly point to existing children. Secondly, the first exception shows that the court must have regard to the circumstances at the date of the will, as known to the testator, in order to place itself "in his armchair." There is clear medical evidence that at that date the testator had been for some time impotent and was aware of the fact; the will must therefore be construed as referring to his existing illegitimate children. (Jarman on Wills, 9th ed., vol. 3, p. 1729 and *Dorin* v. *Dorin* (1) were referred to.) Such evidence must clearly be admissible. In *In re Eve* (2), which was approved by the Court of Appeal in *In re Pearce* (3), a gift was made to the children of a woman, and evidence was given that she was past child-bearing, and it was held that her illegitimate children took under the will. There can be no distinction in principle between a man and a woman in this matter. Where there can be no legitimate members of the class which is to take, it must have been intended that the illegitimate members should take.

T. A. C. Burgess for the University of London, representing parties entitled to take if the gifts to the children should fail. On a matter of face construction, the case is indistinguishable from *Dorin* v. *Dorin* (1); the language of the will, by itself, can throughout consistently be referred to future legitimate children only. Such evidence as has been tendered in the present case has never been admitted or accepted before. In *Ward* v. *Van der Loeff* (4) extrinsic evidence was excluded.

[JENKINS J. That case deals with evidence sought to be adduced in order to exclude the application of the rule against perpetuities; if the principle there laid down applied in the present circumstances, *In re Eve* (2) could not be supported.]

JENKINS J. The question which I have to decide in this case is in substance whether the provision made by the testator in his will for his children by his wife, the first defendant, operates in favour of two illegitimate children he had had by that lady before his marriage to her and during the subsistence of his marriage to a former wife. The facts necessary to make the question intelligible, as opposed to those which may have a special bearing upon its solution, which for the moment I will leave on one side, are these. The testator was married to his first wife some time before the year 1907. In that year they separated. There were never any children of the marriage. In September, 1913, the testator began to cohabit with the lady, who afterwards became his second wife, who is the first defendant in these proceedings. There was a formal deed of separation from his first wife in June 1921. In October of that year the first defendant changed her name by deed poll to her present name of Nellie Wohlgemuth. The first of the two children, the defendant Joan Louise, was born on December 25, 1921, and the second child, the infant defendant Bryan, was born on February 13, 1929. The first wife died on December 31, 1935, and the testator married the first defendant on January 9, 1936. There was of course, no question of the two children being legitimated by that marriage inasmuch they had been born during the subsistence of the testator's marriage to his first wife.

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(1) (1875) L. R. 7 H. L. 568.
(2) [1909] 1 Ch. 796.
(3) [1914] 1 Ch. 254.
(4) [1924] A. C. 653.

The testator's will was dated May 13, 1936, and he died on March 2, 1942. By his will, after revoking all former wills, he appointed his wife, Nellie Wohlgemuth, formerly Nellie Carey, and the public trustee to be executors and trustees of his will, and he went on: "I appoint my said wife to be the "guardian of my infant children." From there, I think, I can pass to the gift of residue which is a general residuary devise and bequest on the usual administrative trusts, and to invest the net residue of the proceeds, which is defined as the testator's residuary trust fund. These trusts of the residuary trust fund are declared: "In trust to pay the income thereof to my said "wife during her life and after her decease in trust for such "children or remoter issue of myself and my said wife in such "shares (if more than one) and in such manner as she shall by "deed or will appoint but I declare that any such will or "appointment shall not be operative until any such child "or children attain the age of twenty-eight years and until "the attainment of the age of twenty-one years the income and "whilst minors such income shall be applied towards their "maintenance and education and in default of any such "appointment and so far as any such appointment shall not "extend in trust for all the children of myself and my said "wife on their attaining the age of twenty-eight years in equal "shares and if there shall be only one such child the whole to "be in trust for that one child and in the event of any such

" child or children dying leaving a child or children such last-" mentioned child or children shall take the share which his her " or their parent would have taken in my residuary trust funds " upon their respectively attaining the age of twenty-one years " and in case there shall be no such issue who shall attain the " age of twenty-eight years or remoter issue who shall attain " the age of twenty-one years in trust as to one-fourth thereof " for any child or children of my brother Ludwig Maximilian " Wohlgemuth (but not to their issue) one-fourth to the " University College London one-fourth to the London " University and the remaining one-fourth to The Berlin " University." I should mention at that point that the interests under that ultimate trust are represented for the purpose of this application by the University of London. Then there are certain declarations. " I further declare that in the " event of there being no such child or children of my said " brother entitled to that one-fourth share the same shall go " to the said Berlin University. And I declare that my " trustees may with the consent in writing of my said wife " during her life and after her decease at their own discretion " raise any part or parts not exceeding together one moiety of " the vested or presumptive share of any child or grandchild of " mine and my said wife under this my will and apply the same " for his or her advancement preferment or benefit as my " trustees shall think fit." I may here mention that the immediate reason for the summons is a desire to exercise that power in the event of the first defendant's children being held contingently entitled under the trusts of residue. Then there is this direction: " I direct and desire that my child or children " shall be brought up without any religious instruction whatsoever," and finally there is a desire that he should be cremated. That is the will, and the question I have to decide is whether the trusts for the testator's children by his wife, the first defendant, operate in favour of the defendants Joan and Bryan, notwithstanding that they were not legitimate children of the testator and his said wife.

The principles to be applied in deciding this question are well settled. They were laid down by Lord Cairns in particular in the case of *Hill* v. *Crook* (1), as follows: " And what appears " to me to be the principle which may fairly be extracted from " the cases upon this subject is this—the term ' children ' in a " will prima facie means legitimate children, and if there is

(1) L. R. 6 H. L. 265, 282, 283.

"nothing more in the will, the circumstance that the person "whose children are referred to has illegitimate children will "not entitle those illegitimate children to take. But there are "two classes of cases in which that prima facie interpretation "is departed from. One class of case is where it is impossible "from the circumstances of the parties that any legitimate "children could take under the bequest. A familiar example "of that might be given in this way: Suppose there is a bequest "'to the children of my daughter Jane,' Jane being dead, and "having left illegitimate children, but having left no legitimate "children. There, inasmuch as the testator must be taken "to have known the state of his family, and must be taken to "have intended to benefit some children of his daughter Jane, "and inasmuch as she had no children who could be benefited "except illegitimate children, rather than that the bequest "should fail altogether the courts will hold that those illegitimate children are intended, and they will take under the "term 'children.' Having referred to that class of cases, "I may put them altogether aside; for your Lordships will "observe that that class of cases can have no bearing upon the "present case, because here, as was truly said, there was no "reason why legitimate children might not take under the "bequest in this will. The other class of cases is of this kind. "Where there is upon the face of the will itself, and upon a "just and proper construction and interpretation of the words "used in it, an expression of the intention of the testator to "use the term 'children' not merely according to its prima "facie meaning of legitimate children, but according to a "meaning which will apply to, and which will include, "illegitimate children. I might give again a familiar illustration of that class of cases by the supposition of a bequest upon "which, I presume, there would be no argument. Suppose that "a testator were to say in his will 'being aware that my "'daughter who is now married to her husband, had before "'her marriage children by the same person, who in law are "'illegitimate children, and it being my intention to provide "'for all the children of my daughter, I give funds to trustees "'upon trust for her for life, and after her death to divide the "'funds among the children of my said daughter.' I apprehend that no person reading a bequest of that kind could "hesitate to say that the testator had shown upon the face "of his will, by the words which he had used, his intention in "a way that could not be mistaken, to use the generic term "children" so as to include illegitimate children along with "legitimate children." That statement of the general law that children in a will prima facie means legitimate children, and of the two exceptions to it, has been approved and followed in many other cases. I was referred to the case of *Dorin* v. *Dorin* (1), which proceeded on those same principles. I was also referred to *In re Eve* (2), where Swinfen Eady J., as he then was, applying the principle stated by Lord Cairns in *Hill* v. *Crook* (3), held that a gift to the children of a woman aged sixty-eight at the date of the testator's will, she having illegitimate children but no legitimate children, operated as a gift to the illegitimate children under the first of the exceptions of Lord Cairns on the ground that in the circumstances it was impossible that there should be any legitimate children of the woman in question to take. That decision was referred to with approval by the Court of Appeal in *In re Pearce* (4). Therefore, so far as I am concerned, I can regard it as settled that the circumstance that a woman, to whose children a gift is made and who has had no legitimate children, is past child-bearing, is a circumstance which can be looked at for the purpose of ascertaining whether the testator by referring to her children in his will meant illegitimate children, and is also a sufficient ground for holding that he did mean illegitimate children. Those, I think, are the only authorities bearing directly on the question to which I need refer.

I was referred by Mr. Burgess in his argument on behalf of the University of London to the case of *Ward* v. *Van der Loeff* (5), where extrinsic evidence was held to be inadmissible for the purpose of excluding from the rule against perpetuities a gift which, if it took effect according to its tenor, would exceed the permitted limits. In my judgment the application of the rule against perpetuities is one to which special considerations apply, and I do not think any assistance for the present purpose is to be derived from the case of *Ward* v. *Van der Loeff* (5). The decision in relation to the rule against perpetuities could not have been intended by their Lordships to apply to cases where the meaning of the word "children" is in question, an application which would, so far as I can see, have been quite inconsistent with the law as laid down in *Hill* v. *Crook* (3) and *Dorin* v. *Dorin* (1), the correctness of which certainly was

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(1) L. R. 7 H. L. 568.
(2) [1909] 1 Ch. 796.
(3) L. R. 6 H. L. 265.
(4) [1914] 1 Ch. 254.
(5) [1924] A. C. 653.

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not questioned in *Ward* v. *Van der Loeff* (1). I think they regarded those cases as of a different class, and in my judgment they are of a different class from cases like *Ward* v. *Van der Loeff* (1), and, I should add, the old case of *Jee* v. *Audley* (2) mentioned in it.

Applying those principles to the present case, first of all, is there anything on the face of the will which enables me to say, not looking beyond the four corners of the will itself, that the testator when he spoke of his children by his wife, the first defendant, meant illegitimate children; in other words that he used the word "children" not in its strict prima facie meaning but in the sense of illegitimate children? In my judgment there is nothing in this will which could lead me to that conclusion. The only passage which at all suggests any such result is the passage where the testator appoints "my "said wife to be the guardian of my infant children." That passage was strongly relied on by Mr. Hunt as imparting a reference to existing children. He said that if the testator, on the true construction of his will, referred to existing children of his by his wife, then inasmuch as the only children by his wife existing at the date of the will were the children Joan and Bryan, that in itself would show that by "children" the testator must have meant illegitimate children, for those were the only existing children to whom he could have referred. I agree that if one could find here a clear reference to existing children, the consequences suggested by Mr. Hunt could follow; but I can say no more of the appointment of the testator's wife to be "the guardian of my infant children" than that it is on the whole perhaps more appropriate to children existing at the date of the will than to possible future children. I cannot say that it is wholly inappropriate to the latter.

Looking at the will as a whole it seems to me that it is as a matter of language perfectly appropriate as a will made wholly in favour of after-born children. That is my conclusion on the will as a whole, and I do not think the very slight indication to the contrary which might perhaps be collected from the appointment of the wife as guardian of the testator's infant children suffices to outweigh the general effect of the will. I therefore hold that the meaning of the word "children" cannot here properly be extended on the strength of any context found in the will itself.

It remains to consider whether, when the surrounding circumstances are looked at, it appears impossible that there should be any legitimate children of the testator by his wife, the first defendant, to take under the will. On that there is evidence which, in my judgment, must clearly be admissible, of the testator's wife and of two doctors who attended the testator. It appears that in or about the year 1918 the testator's first wife, from whom he was separated, paid him a visit and shot him in the back, the bullet I understand, lodging in his spine. That injury had the effect of causing a gradual but progressive deterioration of the testator's use of the lower part of his body. The medical evidence, consisting of affidavits by a Dr. Walshe and Sir James Purvis-Stewart, to which I need not refer in detail, in my judgment quite clearly establishes the fact that at the date of the will and for some years before that date, the testator was incapable of begetting a child, and was fully aware of such incapacity. He was, at the date of the will, aged sixty-seven or thereabouts, but quite obviously there was nothing in his age itself to make it impossible that he should beget a child. The material circumstance is that according to the medical evidence he was suffering from a condition which did make it permanently impossible for him to do so. The wife, the first defendant, was in her fiftieth year at the date of the will, and if the only evidence about her had been that she was in her fiftieth year it might have been that the case could be regarded as on all fours with that of *In re Eve* (1), a case which proceeded on the ground that the woman whose children were mentioned in the will was past the age of child-bearing. The age here is considerably younger than it was in that case, but still the fiftieth year is, at all events, past the normal age of child-bearing. But the matter, so far as the wife is concerned, does not rest solely on the question of age, because the wife's evidence shows her belief to have been that she was an exception to the general rule, and she frankly said that her condition at the date of the will, notwithstanding her age, was still, in her view, such that it would have been possible for her to have a child. In view of that I am unable to found myself on the age of the wife. I think it is, however, material to add this about the wife's evidence. The wife refers in her evidence to the testator's incapacity and says this was a worry to him and that she, notwithstanding her own view as to her capacity, gave him to understand, and he accepted the position, that after an operation she underwent in or about the year 1933, she was no longer capable of intercourse with him. So, according to her evidence, they both accepted and were convinced of the fact that it was quite out of the question that they should have any further children.

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(1) [1924] A. C. 653.

(2) (1787) 1 Cox 324.

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(1) [1909] 1 Ch. 796.

On that evidence, am I justified in holding that it was impossible at the date of the will that there should be any legitimate children of the testator and the wife, the first defendant, to take under the will? It has been pointed out that there is a distinction between this case and the case of *In re Eve* (1), in that here the impossibility, if I hold it proved, turns upon the incapacity of a man and not, as in *In re Eve* (1), upon the incapacity of a woman. In my judgment, the material fact which has to be proved is the impossibility, and for that purpose I see no distinction in principle between the incapacity of a man and that of a woman. No doubt the cases in which a man can be proved to be incapable of begetting children must be few in number, and the onus of proof must be heavy. In the majority of cases I should say it would be a matter which was incapable of proof, but in principle I see no reason why the incapacity of a man, if capable of proof, should not be proved and relied upon just as much as the incapacity of a woman, for the purpose of establishing the impossibility of there being legitimate children to take under a given disposition. In the unusual and peculiar circumstances of this case, and on the evidence, I find that it is proved that at the date of his will the testator was permanently incapable of having any further children by his wife or, indeed, by any other woman, and furthermore that he was well aware at that date that he was so incapable. One may add also that, rightly or wrongly, he believed that in any case there was no longer any possibility of his wife having a child, irrespective of his own capacity.

That being so, in my judgment the case is brought within the first of the two exceptions to the general rule stated by Lord Cairns and applied by Swinfen Eady J. in *In re Eve* (1), and accordingly the material parts of this will must be construed as making provision for the two children of the testator and the first defendant, notwithstanding that they were not legitimate children.

Solicitors for the plaintiff: *M. J. Jarvis.*

Solicitors for the defendants: *Hamlins, Grammer & Hamlin; Field, Roscoe & Co.*

F. R. D.

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(1) [1909] 1 Ch. 796.

ed. C.A. [1949] 1 All E.R.

of HARMAN, J., *on effect of the*
Proceedings Act, 1947, at p.
pproved. C.A. [1949] 1 All
515.

In re BARNATO, DECD.
JOEL *v.* SANGES.

HARMAN
J.

1948

July 6, 7, 21.

Practice — Crown proceedings — Originating summons — Joinder of Crown as defendant — Application by Crown to be struck out as improperly joined—Estate duty—Determination prior to incidence—Whether trustees accountable—Crown Proceedings Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *ss.* 1, 13, 17 (3), 23—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 3 —*Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43—*Finance Act*, 1894 (57 *&* 58 *Vict., c.* 30), *s.* 8—*Finance* (1909–1910) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 33—*Rules of the Supreme Court*, 1883, *Or.* 1A, *r.* 1 (*a*), (*b*) *; Or.* 16, *r.* 11 *; Or.* 25, *r.* 5 *; Or.* 54A, *r.* 1A *; Or.* 55, *rr.* 3, 5.

The effect of the Crown Proceedings Act, 1947, and the rules made thereunder is to make the procedure by originating summons available to the subject against the Crown in any case where it would be available between subject and subject. Apart from the Act, the subject has no general right to oblige the Crown to become a defendant to proceedings by originating summons unless such procedure is authorized by a statute.

Under the testator's will a fund had become vested in certain trustees (the plaintiffs in the originating summons) who were authorized, with the consent of his daughter L. A., to advance part of the share of any child of L. A. Before making a further advance, the plaintiffs asked the Inland Revenue Commissioners whether, if they were to do so, they would, under s. 8, of the Finance Act, 1894, be accountable to the Crown for any estate duty which would become payable in respect of the further advance by virtue of s. 43 of the Finance Act, 1940 (as amended), in the event of L. A., who was seventy years old, dying within five years after the date of the further advance. The commissioners replied that the death of L. A. in such circumstances would give rise to such claim and that the trustees would be accountable for duty. The plaintiffs took out an originating summons asking the court to determine the question of their accountability. They joined the commissioners as defendants and the latter applied to the court to be struck out as having been improperly joined.

Held that, since no present claim had been made by the Crown and no interest had yet arisen in the Crown, the matter raised against the commissioners did not fall within Or. 54A, r. 1A, Or. 55, r. 3, or any other of the Rules of Court authorizing procedure by originating summons, and the commissioners had been improperly joined.

In re Clay. Clay v. *Booth ; In re a Deed of Indemnity* [1919] 1 Ch. 66 and *In re King; Mellor* v. *South Australian Land Mortgage and Agency Co.* [1907] 1 Ch. 72 followed. *Dyson* v. *Attorney-General* [1911] 1 K. B. 410 distinguished.

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

PROCEDURE SUMMONS.

The plaintiffs in the originating summons were trustees in whom was vested a large legacy and other property settled by the will of Henry Isaacs Barnato, but long since segregated from his estate. Under the limitations of the will the fund stood limited in favour of the testator's daughter Lily Asher for a protected life interest, with various remainders over under which the defendants (other than the last defendants) had beneficial interests; in particular, a power of advancement was vested in the plaintiffs as trustees, with the consent of Lily Asher, in favour of her issue.

The plaintiffs considered that estate duty might become payable at a future date by virtue of s. 43 of the Finance Act, 1940 (as amended by the Finance Act, 1946, sch. XI. (3.)) in case of Lily Asher, who was seventy years old, dying within five years from the date of the advance, and that the plaintiffs might be held accountable therefor under s. 8 of the Finance Act, 1894. They were desirous of knowing whether this claim could in law be established against them, for that was a vital factor in considering whether they would part with the money to be advanced. The plaintiffs desired to have the question determined by the court, and, before issuing the originating summons, they communicated through their solicitors with the solicitor of Inland Revenue, submitting a draft of the summons to him and asking whether the Attorney-General should be joined. In his answer, dated March 25, 1947, the solicitor of Inland Revenue made, among others, the following observations: "Should the proposed advance be "made, it would seem that the death of Mrs. Lily Asher would "give rise to a claim for estate duty (additional to that on the "funds retained by the trustees till her death) . . . . the "official view is the proposed plaintiffs to the summons will be "accountable for any estate duty payable." By the same letter he objected to the joinder of the Attorney-General.

On June 3, 1948 the plaintiffs issued an originating summons, whereby they raised two questions of construction and administration in connexion with the power of advancement and the application of any sums to be advanced; in neither of these questions was the Crown in any way interested or concerned. Question 3 of the summons was as follows: "If the plaintiffs "have power to and do advance any such further sum, whether "they will be accountable for any estate duty which may "become payable on such further sum on the death of the said "Lily Asher notwithstanding that such further sum is no

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"longer vested in them and if so whether they ought to make "any and what provision out of such further sum or otherwise "for the possibility that such estate duty may become "payable." Notwithstanding the objection of the commissioners, the plaintiffs joined them as the last defendants to the originating summons, they having been joined to represent the Crown instead of the Attorney-General by reason of s. 17, sub-s. 3, of the Crown Proceedings Act, 1947. The Inland Revenue Commissioners applied by summons under the Rules of the Supreme Court, Or. 16, r. 11, to be struck out as having been improperly joined as parties.

J. H. Stamp and *R. Lionel Edwards* for the Commissioners of Inland Revenue. The point raised against the commissioners by Question 3 of the originating summons is not within the jurisdiction of the court because the Crown cannot be joined as a defendant to an originating summons against its will. Further, questions of future facts and future law are involved; s. 43 of the Finance Act, 1940, as amended, might no longer be in force at the relevant date: *In re Clay; Clay* v. *Booth; In re A Deed of Indemnity* (1) and *In re King; Mellor* v. *South Australia Land Mortgage and Agency Co.* (2). It is conceded that the court may have jurisdiction over questions of construction, so far as they pertain to domestic matters between the trustees and the beneficiaries, but not so far as they might bind the Crown. Our application to strike out has been made as early as possible, having regard to *In re Davies; Davies* v. *Davies* (3).

Christie K.C. and *Hillaby* for the plaintiffs. Apart from the Crown Proceedings Act, 1947, the plaintiffs have a general right to make the Crown a defendant in these proceedings. The plaintiffs could have brought an action for a declaration, and the originating summons is merely a short and convenient procedure in lieu of a writ; *Dyson* v. *Attorney-General* (4). This remedy has been available in matters relating to death duties ever since these duties were introduced by the Finance Act, 1894. The question raised by the summons is of great importance for the Crown and the subject, and it is convenient that it should be determined by originating summons; *In re Chamberlain's Settlement. Chamberlain* v. *Chamberlain* (5). Since January 1, 1948, the court has additional jurisdiction under the Crown Proceedings Act, 1947. If the case arose between subject and

(1) [1919] 1 Ch. 66.
(2) [1907] 1 Ch. 72.
(3) (1888) 38 Ch. D. 210.
(4) [1911] 1 K. B. 410.
(5) [1921] 2 Ch. 533.

subject, an originating summons would be appropriate; R. S. C., Or. 54A, r. 1A, Or. 55. r. 3.

[HARMAN J. Is there a present right of the Crown in issue? Could the Crown now obtain an injunction against the plaintiffs restraining them from distributing the money?]

That depends on the interpretation of s. 43, sub-s. 1 of the Finance Act, 1940, as amended The claim when made is retrospective. It would be unsatisfactory if the trustees had no possibility of determining the question without exposing themselves to personal liability.

Jopling and *Blackett-Ord* for the first, second and third defendants, beneficiaries under the will, adopted the arguments of the plaintiffs.

Elverston for the fourth defendant, another beneficiary.

J. H. Stamp and *R. Lionel Edwards* in reply. The Crown Proceedings Act, 1947, does not affect the case, apart from having substituted the Inland Revenue Commissioners for the Attorney-General.

Cur. adv. vult.

July 21. HARMAN J. read the following judgment. The first question which arises is whether proceedings of this nature are available to the subject against the Crown. Estate duty was created by the Finance Act, 1894, and under that Act certain machinery was set up for determining questions between the subject and the Crown; thus under s. 10 an appeal was provided from a decision of the commissioners to the High Court, and under rules made in 1895 such proceedings must be taken by way of petition in the Queen's Remembrancer's department. The Act of 1894 was considerably altered by the Finance (1909–10) Act, 1910, and under s. 33 of that Act further machinery for deciding questions was provided, the procedure being again by petition. So far as I am aware, before the year 1933 questions of liability to estate duty between the Crown and the subject were always decided either under the before-mentioned machinery or on English information of the Attorney-General. It was, however, realized that it would be extremely convenient if questions of this sort could be decided by a less cumbrous procedure than petition or information, and accordingly there was included in the Administration of Justice (Miscellaneous Provisions) Act, 1933, a section 3 providing for the determination by the High Court in a summary way of such questions of liability. The section provided for Rules of Court; none have ever been made, but ever since the passing of that Act the procedure by originating summons under Or. 54A, r. 1A, has been frequently resorted to and has proved convenient and efficient. To such summonses the Attorney-General or the commissioners are made defendants. It is admitted that that section has no application here because (to adopt the language of the section) no "claim "has been made by the Crown," nor is any claim apprehended in respect of "duties which have or are alleged to have become "chargeable" by reason of the death of any person. Mrs. Asher is still alive.

The plaintiffs, nevertheless, allege that there is a general right in the subject to oblige the Crown to become a defendant to proceedings by way of originating summons not provided for by any statute, and that in fact a remedy of this sort has always been open ever since the year 1894, though never before resorted to. This is a bold claim, and I do not accept it. The summary procedure by way of originating summons is not, in my judgment (unless under the Crown Proceedings Act, 1947, with which I will deal in a moment), available against the Crown for the determination of a question of liability to estate duty except in so far as is provided by the section of the Act of 1933 already cited. There may have been cases, for aught I know, where the Crown has been willing to accede to the request of the subject to submit to the jurisdiction of the court for the purpose of deciding such a question of liability, but I do not think that the Crown can be obliged to take this course, and indeed it would often be highly inconvenient that the Crown should be made a defendant to proceedings of a domestic character between beneficiaries under a will or settlement simply because the result of the answer to one of the questions might be supposed to affect some question of liability to estate duty, or for that matter to income tax. The plaintiffs justify this claim on the authority of *Dyson* v. *Attorney-General* (1), where the Court of Appeal held that a declaratory judgment under Or. 25, r. 5, could be made against the Attorney-General. Those, however, were proceedings by writ, and in my judgment the decision in that case does not apply to the summary procedure by originating summons. Farwell L.J. in that case pointed out (2) that when the interests of the Crown were only indirectly affected, the old courts of equity, whether the Court of Chancery or the Court of Exchequer, did make declaratory orders which affected the rights of the Crown. Whether the

(1) [1911] 1 K. B. 410. (2) Ibid. 421.

plaintiffs would have been in a better position if they had started the present proceedings by writ I need not determine, but as at present advised it seems to me that there would have been very great difficulties in their way in framing a claim that could not be struck out in limine. Moreover, the making of a declaration in such proceedings was always a matter of discretion (see *Smeeton* v. *Attorney-General* (1)). The Attorney-General is, of course, frequently added as a defendant to originating summonses which raise questions where charitable bequests or donations are or may be involved, but these are not, in my judgment, a precedent for the present purpose. In charity cases the Attorney-General is joined to represent the Crown as parens patriæ and to enable him to intervene for the protection of charities, and to assist the court. No question of the liability of the subject to tax is involved. The Crown is concerned in a fiduciary capacity.

I must next consider whether the position in this respect has been altered by the Crown Proceedings Act, 1947. It is to be observed that s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, already referred to, has not been repealed by the Act of 1947, which does repeal other sections in the same Act. It is, therefore, clear that the procedure already referred to for the decision of estate duty claims is not abolished, and s. 1 of the Act of 1947 which refers to proceedings under any statutory provision repealed by the Act, does not apply. Section 13 of the Crown Proceedings Act, 1947, provides that all civil proceedings against the Crown " shall be " instituted and proceeded with in accordance with Rules of " Court." Section 23 (2.) provides that any reference in the Act to civil proceedings against the Crown " shall be construed as a " reference to . . . . (*b*) . . . . proceedings for the obtaining " of any relief which, if this Act had not been passed, might " have been obtained by an action against the Attorney-" General." By R. S. C. Or. 1A, r. 1 (*a*): " The Rules of " the Supreme Court shall, so far as may be, apply to all civil " proceedings against the Crown instituted in the High Court " on or after the 1st January, 1948," and (*b*): " Such civil " proceedings as aforesaid shall, so far as may be, take the same " form as civil proceedings between subjects, and shall, if no " special form is applicable, take the form of an action " commenced by writ " (2). At an early stage of the hearing both parties appearing before me disclaimed the notion that this Act had anything to do with the present proceedings, but Mr. Christie for the plaintiffs later resiled from that view. In my judgment he was right, and the effect of the sections and the rules to which I have referred is to make the procedure by originating summons available to the subject against the Crown in any case where it would be available between subject and subject. I must, therefore, consider whether question 3 of the summons is one that comes within the Rules of Court, for procedure by way of originating summons being a creature of statute can only be resorted to in cases provided for by the rules. The plaintiffs allege that question 3 of the originating summons is justified either by R. S. C. Or. 54A, r. 1A, or by Or. 55, r. 3.

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(1) [1920] 1 Ch. 85.

(2) Order 1A was added by the Rules of the Supreme Court (Crown Proceedings), 1947 (St. R. & O. 1947, No. 2530 L/33).

As to the first of these the plaintiffs must be persons claiming a "legal or equitable right," such right depending upon a question of construction of a statute. In my judgment the plaintiffs are not here claiming any legal or equitable right, for no claim for duty at present exists. The plaintiffs are merely asking the court to assume that hereafter, when Mrs. Asher dies, they may acquire such a right. Moreover the statutes to be considered—that is to say, s. 8 of the Finance Act, 1894, and s. 43 of the Finance Act, 1940, may not be in existence at the relevant date. This rule, therefore, does not help the plaintiffs. As to Or. 55, r. 3, that clearly justifies the taking out of a summons in respect of questions 1 and 2 and the joinder of the defendants other than the Crown; but on turning to Or. 55, r. 5, to find who are the persons to be served, I do not find that the Crown comes into any of the categories set out in the rule. It is true that the commissioners have alleged that their present view is that a claim may hereafter arise, but no present claim has been made, nor has any right or interest yet arisen in the Crown which is sought to be effected. The case of *In re Clay. Clay* v. *Booth. In re A Deed of Indemnity* (1) shows that there was no jurisdiction to make a declaratory order in a case where the defendant had put forward no present claim. Moreover the decision in *In re King. Mellor* v. *South Australian Land Mortgage and Agency Co.* (2) shows that a person not a beneficiary under a trust cannot be brought before the court on an originating summons for the purpose of deciding a future contingent claim where the alleged claimant has not asserted any right presently enforceable either at law or in equity.

(1) [1919] 1 Ch. 66.

(2) [1907] 1 Ch. 72.

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It was urged by the plaintiffs that a question of this sort ought to be left to be decided at the hearing and not dealt with by an interlocutory order, but I do not feel the force of this. The point could be taken as a preliminary point at the hearing, but there is no object in leaving it undecided now that it has been raised and argued. Moreover, the case of *In re Davies. Davies* v. *Davies* (1) shows that the court favours the taking of such a point at an early stage, and indeed, may penalize a defendant who fails to do so.

I am of opinion that the commissioners have been improperly joined and ought to be struck out.

Order made to strike out the Commissioners of Inland Revenue as defendants. Leave to appeal.

Solicitors for the plaintiffs: *Wild, Collins & Crosse.*

Solicitors for the first, second and third defendants: *Behrend* (*R. H.*), *Kendall, Price & Francis.*

Solicitors for the fourth defendant: *Elvy Robb & Co.*

Solicitors for the fifth defendant: *Solicitor of Inland Revenue.*

(1) (1888) 38 Ch. D. 210.

1948

Oct. 12, 13.

Lord Greene M.R., Somervell and Evershed L.JJ.

In re DUFFY.

LAKEMAN *v.* ATTORNEY-GENERAL.

Revenue—Estate duty—Company's shares—Basis of valuation—Profits made after deceased's death—Whether provision for income tax deductible—" Liabilities of the company "—Meaning—Finance Act, 1940 (2 & 3 *Geo.* 6, *c.* 29), *s.* 50, *sub-s.* 1; *s.* 55, *sub-s.* 2.

Where shares in a company fall to be valued in accordance with the provisions of s. 55 of the Finance Act, 1940, for the purpose of ascertaining the estate duty payable on the death of a shareholder, the " liabilities of the company " referred to in s. 50, sub-s. 1, of the Act for which an allowance is to be made under s. 55, sub-s. 2, are limited to legal liabilities actually existing at law at the relevant date. Accordingly, where the deceased died during the company's financial year, there cannot be deducted from the profits of the company referable to the period between the beginning of that financial year and the death of the deceased the income tax attributable to such profits. The profits which are earned during the year in which the deceased died carry, so to speak, in gremio a liability to tax in respect of the financial year which will only begin after his death. Such liability, however, does not become a legal liability until a subsequent date and, accordingly, is not deductible in estimating the value of the shares under s. 55.

APPEAL from Roxburgh J.

Joseph Duffy died on June 24, 1942. He then owned 9,900 Ordinary Shares of 1*l.* each in the capital of Wharfage and Supplies, Ld. It was agreed that these shares and also the shares which he held at his death in two other companies must be valued for the purpose of calculating estate duty in the manner laid down in s. 55 of the Finance Act, 1940.

It is the practice of the Commissioners of Inland Revenue, in applying the valuation provisions of s. 55, to start with a valuation of the company's assets less liabilities as shown by the company's last balance sheet for the last financial year ending before the deceased's death. Where the deceased died during another financial year, it is the practice to add a proper proportion of the profits made in that year and referable to the period before the death and to treat that sum as an addition to the assets and to deduct therefrom the liabilities attributable to that broken period. In the case of each of these three companies profits had been earned in the financial year in which Joseph Duffy died.

This summons, to which the Attorney-General was defendant, was taken out by Joseph Duffy's executors asking whether in calculating the value of the 9,900 ordinary shares in accordance with the provisions of s. 55 of the Finance Act, 1940, there should be included in the allowance for liabilities referred to in s. 55, sub-s. 2 (*a*) a sum equivalent to income tax at the standard rate for the financial year 1943–44 on the proportion of the profits of the company applicable to the period from July 31, 1941 (being the date of the end of the financial year of the company) to June 24, 1942 (being the date of the death of Joseph Duffy) and, if so, what sum should be so provided. The summons asked similar questions with regard to the shares in the two other companies which also had to be valued in accordance with the provisions of s. 55.

Roxburgh J. held that no sum was deductible. The executors appealed.

Millard Tucker K.C. and *J. W. P. Clements* for the appellants. It is agreed that the shares of the deceased in these three companies must be valued for the purposes of estate duty in accordance with the provisions of s. 55 of the Finance Act,

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1940 (1). In estimating the value of the shares of a company there must be deducted from the net value of the assets of such company an allowance for "liabilities of the company" in accordance with the provisions of sub-s. 2 of s. 55 estimated in the manner provided for by s. 50, sub-s. 1. Where a company makes profits in any year, it is necessary to make provision out of those profits for the liability to income tax which will be estimated by reference to those profits for the following year. The Commissioners of Inland Revenue have allowed as a deduction the company's liability for income tax for the year 1942–1943 in which the decased died. The appellants contend that an allowance should also be made in respect of a due proportion of the tax attributable to profits earned in the year in which the deceased died. It is not claimed that there was in fact existing an actual liability to tax for that period in which he died but it is claimed that there was then in existence a contingent liability which the commissioners should estimate in accordance with the provisions of s. 50, sub-s. 1, of the Act of 1940. Income tax is payable and chargeable for the year in which it is assessed but it is measured by the amount of the income for the previous year. Section 210 of the Income Tax Act, 1918 and the Provisional Collection of Taxes Act, 1913, show that the assumption is that income tax will be imposed annually. The tax cannot be regarded as one which may or may not be imposed again. The fact that if the company were wound up before the tax were imposed for the year 1943–44 there would be no liability to tax in respect of the profits earned in the year in which the deceased died does not affect the matter. The commissioners must make a deduction for this possibility in estimating the amount of the contingent liability for income tax. He referred to *Brown* v. *National Provident Institution* (1), *Whelan* v. *Henning* (2). The liability of the company for income tax for the year 1943–44 is attributable to the income which was in part earned before the deceased's death. The words "liabilities of the company" in s. 50, sub-s. 1, are not restricted to existing legal liabilities. There is no doubt that from a business point of view the profits of the company are subject to a liability for income tax. The directors would not be justified in distributing all the profits which the company had made in one year without setting aside any reserve for income tax.

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(1) Finance Act, 1940, s. 50, sub-s. 1: "In determining the "value of the estate for the "purpose of estate duty the "provisions of sub-s. 1 of s. 7 "of the Finance Act, 1894, as to "making allowance for debts and "incumbrances shall not have "effect as respects any debt or "incumbrance to which assets "of the company passing on the "death by virtue of s. 46 of this "Act were liable, but the commissioners shall make an allowance from the principal value of "those assets for all liabilities of "the company (computed as regards liabilities which have not "matured at the date of the "death, by reference to the value "thereof at that date, and, as "regards contingent liabilities, "by reference to such estimation "as appears to the commissioners "to be reasonable) other than— "(*a*) liabilities in respect of shares "in or debentures of the company; and (*b*) liabilities incurred otherwise than for the "purposes of the business of the "company wholly and exclusively."

Section 55, sub-s. 1: "Where "for the purposes of estate duty "there pass, on the death of a "person dying after the commencement of this Act, shares in or "debentures of a company to "which this section applies, then "....... the principal value "of the shares or debentures, in "lieu of being estimated in "accordance with the provisions "of sub-s. 5 of s. 7 of the Finance "Act, 1894, shall be estimated by "reference to the net value of the "assets of the company in "accordance with the provisions "of the next succeeding subsection."

Sub-section 2: "For the purposes of such ascertainment as "aforesaid—(*a*) the net value of "the assets of the company shall "be taken to be the principal value "thereof estimated in accordance "with the said sub-s. 5, less the "like allowance for liabilities of "the company as is provided by "sub-s. 1 of s. 50 of this Act in "relation to the assets of a "company passing on a death by "virtue of s. 46 of this Act, but "subject to the modification that "allowance shall be made for "such a liability as is mentioned "in para. (*b*) of that sub-section, "unless it also falls within para. (*a*) "thereof."

Pennycuick K.C. and *J. H. Stamp* for the Attorney-General. The question at issue is a narrow one: namely, whether the expression "contingent liabilities" in s. 50, sub-s. 1, covers a prospective liability for next year's income tax, such liability admittedly not being an existing liability at the date of the deceased's death. Giving words their ordinary meaning, a prospective liability for income tax is not a "contingent "liability." Prima facie one would expect liabilities in s. 50 to be of the same category of liabilities as those provided for by the Finance Act, 1894, namely, a legal liability. The words in brackets in s. 50, sub-s. 1, refer to two classes of liabilities: namely, first, liabilities which had not fallen due for payment, such as payment under a deed of covenant or a payment under a bill which had not yet matured and, secondly,

(1) [1921] 2 A. C. 222. (2) [1926] A. C. 293.

contingent liabilities, meaning liabilities existing at the date of death whether by contract or statute the discharge of which was at that date not merely future but dependent on some future event. A contingent liability is provable in bankruptcy but if there is no present obligation the mere expectation of liability is not provable. There are two elements to be considered, first, the tax is imposed annually; secondly, the trader is only liable if he carries on his trade into the next year. These two elements taken together are inconsistent with the view that there is a subsisting liability in respect of the next year's tax. [He was stopped.]

Lord Greene M.R. Once the point in this controversy is properly appreciated, I do not find that it is a particularly difficult one to deal with.

The question raised relates to the proper method of valuing for the purpose of estate duty shares in three companies held by the deceased, those companies being companies which fall within the special class of company for which s. 55 of the Finance Act, 1940, makes provision.

I need not go into an examination of what it is that brings these companies under that provision. There is no dispute as to that. But, in point of machinery, when a testator dies possessed of shares in such a company for the purpose of estate duty a special method of valuation is laid down by the section. Putting it quite shortly, the principal value of the shares is to be taken as being a proportion of the principal value of the entirety of the shares and the principal value of the entirety of the shares is to be ascertained by reference to the value of the assets of the company. That is the sort of artificial scheme with which we are very familiar in Finance Acts. It is a scheme by which an existing state of law is, so to speak, pulled to pieces, and as a result something is deemed to be a person's property that, in law, it is not.

In the present case the deceased died on June 24, 1942, during the financial years, which were all different, of these three companies. From the date, it is obvious that he died in the middle of the financial year for revenue purposes.

The method of valuation of shares in such a case is to be found in s. 55, sub-s. 2, of the Finance Act, 1940. It is to be remembered, as I said a moment ago, that the valuation starts off by reference to the value of the assets of the company. Paragraph (*a*) says this: "The net value of the assets of the

" company shall be taken to be the principal value thereof " estimated in accordance with the said sub-s. 5 "—that is sub-s. 5 of s. 7 of the Finance Act, 1894—" less the like " allowance for liabilities of the company as is provided by " sub-s. 1 of s. 50 of this Act in relation to the assets of a " company passing on a death by virtue of s. 46 of this Act " ; but subject to a particular modification, the modification being one under this s. 55 by which, for the purposes of valuation, a particular kind of liability may be deducted, which could not be deducted in the valuation for the purposes of s. 50.

The dispute here is as to what liabilities may, for the purposes of this valuation, be deducted from the gross value of the assets of the three companies. It appears to be the practice, in applying these valuation provisions, to start off with a valuation of the assets less liabilities as shown by the last account of the company in respect of the financial year ending last before the deceased's death. That is the starting point, so to speak. But, obviously, the relevant date being the deceased's death, which took place during the next financial year of the company, something must be done to bring the valuation up to date. The practice appears to be to take, first of all, a proper proportion of the profits of that year referable to the broken period before the deceased's death, and to treat that as an addition to the assets and deduct any liabilities that in the interval during that broken period have been incurred.

In the present case each of these companies made profits in the year in which the deceased died. According to the system that I have mentioned, a proportionate part of these profits would fall to be added to the value of the companies' assets as shown by the previous balance sheets. What is said is this : The profits earned in the year during which the deceased died will form the basis of the assessments for income tax in respect of the next year. Therefore, the profits which are earned during that year in which the deceased died carry, so to speak, in gremio a liability for tax in respect of the financial year which will only begin after the death of the deceased. Roxburgh J. has held that that argument does not succeed.

In my view, the point comes down to a very short point of construction. It is to be observed, generally, that if a trader or a person liable to tax under Sch. D. makes profits let me say in year three, he will be assessed in respect of the profits of that year on the basis of the profits that he made in year two. In year two, while he was making those profits, no doubt if he were a prudent person, he would say to himself: "It is morally "certain that when year three comes along those profits that "I have made will form the basis of my income tax assessment "for year three. I will therefore not spend all those profits. I am "going to set aside a reserve against that liability if and when, "as a business man naturally assumes that it will, it arrives." The advantage of such prudent behaviour is quite clear because it may be in the next year he may not make a penny of profit, and, if he has spent all his profits of the previous year, he will find himself liable to be assessed on those profits, and he will have no profits out of which he can pay tax. Therefore, from the business point of view, I entirely accept the proposition that a provision of that kind would be a prudent and, indeed, a customary thing for a trading company to make.

Turning back to the valuation section, which is incorporated into s. 55, namely, s. 50, sub-s. 1, I find this: "In determining "the value of the estate for the purpose of estate duty the "provisions of sub-s. 1 of s. 7 of the Finance Act, 1894, as to "making allowance for debts and incumbrances shall not have "effect as respects any debt or incumbrance to which assets "of the company passing on the death by virtue of s. 46 of this "Act were liable." I need say no more about that part of the sub-section save this: s. 7, sub-s. 1, of the Finance Act, 1894, was drafted with reference to the valuation not of a particular piece of property but the valuation of the estate of the deceased as a whole. Those valuation provisions and directions for deducting debts and incumbrances would not have worked in the case of the very artificial idea underlying these sections by which things which were not the deceased's assets are to be deemed to be his assets. Accordingly, in substitution of the provision for deducting debts and incumbrances in s. 7, sub-s. 1, of the Act of 1894, this provision is inserted: "But "the commissioners shall make an allowance from the principal "value of those assets for all liabilities of the company," and then in brackets "(computed, as regards liabilities which have "not matured at the date of the death, by reference to the "value thereof at that date, and, as regards contingent "liabilities, by reference to such estimation as appears to the "commissioners to be reasonable)"—that is the end of the brackets—other than the two particular matters referred to under headings (*a*) and (*b*): the first one being "Liabilities in "respect of shares in or debentures of the company," and the second one being "Liabilities incurred otherwise than for the "purposes of the business of the company wholly and "exclusively." That is dealing with a different class of company to the class with which we are concerned; but the important thing is that that valuation provision is to be used in connexion with the class of company with which we are concerned, subject to the variation that there may be deducted liabilities mentioned in para. (*b*), that is to say: "Liabilities "incurred otherwise than for the purposes of the business of "the company wholly and exclusively." If it had not been for that modification, an income tax liability, I apprehend, would not have been deductible, but the effect of altering s. 50 in that respect so as to allow for deduction of liabilities mentioned under head (*b*) is to permit a deduction in respect of income tax liability.

Coming back to the body of sub-s. 1 of s. 50, the commissioners are directed to make an allowance "from the principal value "of the assets" (that would be the assets of the company) "for all liabilities of the company." It is to be observed that this process of arriving at the net value being a variant of what I may call the basic process provided for by s. 7, sub-s. 1, one would rather expect—I do not attribute any practical force to this argument, but it is right to point it out—that this new provision for arriving at the net value would not introduce a class of deduction going beyond the sort of thing which was deductible under s. 7, sub-s. 1—which were debts and incumbrances. It is perfectly true that the language used here is different. It does not say "debts and incumbrances"; it says "all liabilities of the company." We are all familiar with the fact that, in speaking of the liabilities of a company which keeps accounts, the word "liabilities" may be used in two senses. From one point of view, in reference to a particular company, anything that appears on the left-hand side of its balance sheet is a liability. In the accountancy sense, it is a liability whether it be a provision for an actual legal liability, or whether it be a provision which the directors, as business men, think is prudent to make for something that may or may not happen in the future. From the accountancy point of view, once these things are properly entered on the left-hand side of the balance sheet, they are liabilities.

Mr. Tucker repudiates the suggestion that he wished to construe the word "liabilities" in so extended a sense; but he rejects the suggestion that the word "liabilities" is to be construed in the limited and narrow sense of legal liabilities existing in point of law, whether under a contract, or under a statute, or in some other way. He says that in the present case you have a sort of half-way house. By that I mean this. When the testator died the company had made, and was making profits in respect of the exchequer financial year then current which would form the basis of its assessment to income tax for the following financial year. He then says: "Notwithstanding "the fact that the testator died long before the commencement "of that exchequer financial year, and, therefore, long before "the beginning of the period in respect of which the assessment "would take place on the basis of those profits, nevertheless "those profits"—if I may return to the phrase I used earlier—"directly they were made carried within themselves, so to "speak, in gremio a liability to tax which in every business "sense would materialize into a legal liability as soon as the "Budget Resolutions in the following year were passed." As I say, from the business point of view, I have no quarrel with that statement of the situation. It may very well be that a business man, who did not make proper provision for tax payable in the next year, would be very unwise. But what we have to do is to construe the word "liabilities."

Before I state in a sentence my opinion on that point, I must just add a reference to the words in brackets in s. 50, sub-s. 1, which I have quoted as to computing the liabilities of the company. The words in brackets deal with two sub-classes of liabilities. Neither of those sub-classes can go beyond the head class of liabilities. In other words, in order to fall within one or other of those two sub-classes, a thing must be a liability. Those two sub-classes are as follows: firstly, the liabilities "which have not matured at the date of the death." That has a very simple meaning. The other class is as regards "con-"tingent liabilities," which are to be valued by reference to an estimate. In that context what I have to ask myself is this: What is the meaning of "liabilities," and, in particular, what is its meaning in the phrase "contingent liabilities"? It is to that simple point that this controversy comes down.

It appears to me that, in the absence of some context justifying a limitation of those words or some qualification being imposed upon them, all we can do is to construe them in their natural and ordinary meaning. It is not for us to extract what we might like to think in certain cases would be a fairer method of valuation. What we have to do is to ascertain, from the construction of the words used by Parliament in stating its will, is the method of valuation prescribed in accordance with the natural and ordinary meaning of the words in their context, and to apply them, even though in this case, or in another case, we may think that some different method of valuation would have led to a fairer result. It may or may not be so. Anyone who is familiar with income tax or revenue law knows perfectly well that general provisions in an individual case may work rather harshly, but in another case they may work for the benefit of the income tax payer. All we have to do is to apply them. Mr. Tucker says " Income tax is a very special thing. " It cannot be classed with the sort of apprehended future " event which may or may not happen. It is as certain as " anything can be." A glance at the Income Tax Acts makes it quite clear that income tax will be imposed. Therefore he says as soon as the profits are earned which are to form the basis of next year's assessment, you can say with absolute moral or business certainty, however you like to put it: " Those profits will form the basis of next year's assessment, " and any prudent business man will not regard them as " spendable save after making proper provisions for that " liability which is going to arise in the future." That is an attractive argument in this sense: To speak of income tax next year as if the question whether it was or was not going to be imposed were a thing at large would be stupid. Of course, there are matters of uncertainty about it as to what the rate of tax will be and such like. There may well be other forms of tax of which one can predict in one year that it is as sure and as certain as anything can be that that particular tax is going to be imposed next year. If, for instance, you have a general election in which a particular party has as a plank in its platform a new type of tax, and they come in with a very large majority, one can be practically certain that the new government will take very active steps to impose that tax. Any business man confronted with such a situation would probably make provision for meeting it. It could not be said that anything of that kind was a liability, although it is absolutely certain, just as certain, I venture to think, in the case I put as it is that Parliament next year will pass the annual Income Tax Act.

But, quite apart from all these considerations, taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always perfectly ascertainable without any doubt whatsoever, namely, an existing legal liability, actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision but which in law does not become a liability until a subsequent date.

That appears to me to be the short answer to this appeal, which, in my opinion, should be dismissed with costs. I agree with the decision of Roxburgh J.

Somervell L.J. I agree. The reasons which have led me to the conclusion that this appeal should be dismissed have already been expressed by the Master of the Rolls, and I do not think I can usefully add anything.

Evershed L.J. I also agree.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *George & William Webb; Solicitor of Inland Revenue.*

B. A. B.

VAISEY J.
1948
Oct. 28.

EPSOM AND EWELL CORPORATION *v.* STREATHAM PROPERTY INVESTMENT LIMITED.

Town and country planning—Local authority—Land zoned as green belt—Permission to build refused—Whether refusal on ground that land required as " public open space "—Town and Country Planning Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 48), *s.* 10, *sub-s.* 6.

Where an appeal to the Minister under s. 10, sub-s. 5, of the Town and Country Planning Act, 1932, against refusal of permission to develop land has been dismissed, the local authority can only be required to purchase the land under sub-s. 6, of s. 10, of the Act if the appeal has been dismissed on the ground only that the land ought to be reserved as " a public open space " ; and it is immaterial that the other requirements of sub-s. 6 have been fulfilled.

Action.

The plaintiffs were the Interim Development Authority for the purpose of the Town and Country Planning Acts, 1932–1944, of an area which included land known as Worcester Park House Estate in the borough of Epsom and Ewell, in the county of Surrey. They had been the planning authority for that area prior to November 1, 1944, but on that date they delegated their functions to prepare a town planning scheme to the North-East Surrey Joint Planning Committee. The defendants were the owners in fee simple of Worcester Park, on which they desired to build houses. Under a scheme prepared in 1937 known as the Epsom and Ewell Town Planning Scheme, this land was zoned as a special residential area, with houses at a density of six or eight to the acre. In June, 1939, the plaintiffs gave approval in principle to the proposed development of this land. During the war the scheme fell into abeyance.

In 1945 the Greater London Plan, prepared by Sir Patrick Abercrombie, was published by the Stationery Office. An intention was shown in the plan to create a " green belt " in this neighbourhood, although it was not suggested that Worcester Park, in particular, should be a public open space. The plan had no legal force or effect, but the Minister of Town and Country Planning in a memorandum made in 1945, intimated to Interim Development Authorities (including the plaintiffs) that they should adhere to the Greater London Plan. In a report by an advisory committee for London Regional Planning in 1946 the green belt ring was referred to as being " still largely open country, but it includes several established " centres of population . . . . It is not intended that all, " or even a large part of this area, should be acquired out-" right by local authorities, but many playing fields, recreation " centres and other open spaces could be accommodated in it." The defendants by their agents renewed their application for permission to develop Worcester Park on December 12, 1944, and (after postponement) again on August 13, 1945. The plaintiffs on the recommendation of the North-East Surrey Joint Planning Committee gave notice of disapproval of the proposed development, on the ground that Worcester Park was zoned as " green belt " in a scheme under preparation. By a notice of appeal dated January 27, 1947, the defendants appealed to the Minister of Town and Country Planning, under s. 10, sub-s. 5, of the Town and Country Planning Act, 1932 (1). The grounds of the appeal were : " Subject to certain

(1) The Town and Country Planning Act, 1932, s. 10, sub-s. " 5. An applicant who is " aggrieved by the refusal of the " authority to consent to his " application . . . . may . . . . " appeal to the Minister, and the " Minister . . . . may dismiss or " allow the appeal . . . . but the " Minister before deciding any such " appeal, shall, if either the appel-" lant or the authority so desire,

"conditions, the development was approved . . . . on June 21 "1939, but was not carried out because of the war. The "proposed development can be effected forthwith and does "not contravene the scheme now in existence (except as regards "further revision on the lines of the Greater London Plan) ". . . . the appellant will suffer considerable loss and hardship "if the proposed development is not allowed. The public will "also be deprived of 195 houses at a time when the need is so "urgent. The site . . . . does not naturally form part of the "green belt wedge . . . . this site could be completed in "harmony with the adjoining built-up areas without in any "way detracting from the adjoining open space. The lay-out "plans sufficiently indicate that no detriment or injury will "arise to other interests if development is permitted, that the "land is suitable for immediate development and that if it is "reserved as a public open space the provisions of s. 10, sub-s. 6, "of the Town and Country Planning Act, 1932, are applicable."

A public local inquiry was held in regard to the appeal on March 31, 1947. By a letter dated May 19, 1947, written on behalf of the Minister, the appeal was dismissed. The terms of the decision are set out and commented on in the judgment. On May 30, 1947, the defendants' solicitors gave notice to the plaintiffs under sub-s. 6 of s. 10, of the Act, requiring them to purchase Worcester Park. By a letter of July 16, 1947, the plaintiffs informed the defendants' solicitors that they were not prepared to purchase the land. By this action the plaintiffs asked for a declaration that they were under no obligation under sub-s. 6 of s. 10, or at all, to purchase Worcester Park. The

"afford them an opportunity of "appearing before and being heard "by a person appointed by the "Minister for the purpose. The "decision of the Minister on "an appeal under this sub-"section shall be final and shall "have effect as if it were a decision "of the authority.

"Sub-section 6. Where an "appeal to the Minister under the "last preceding subsection is dis-"missed on the ground only that "the land to which the appeal re-"lates, though otherwise suitable "for immediate developments "ought to be reserved by the "scheme for a public open space, "and the Minister is satisfied that, "if the appeal had been allowed, "the development for which per-"mission was sought would have "taken place within a reasonable "period, the appellant, if he is "entitled to dispose of the fee "simple of the land with vacant "possession, may by notice in "writing given to the authority "within six months from the date "of the Minister's decision, "require the authority to purchase "the land at a price to be agreed ". . . . and the authority shall "purchase the land accordingly."

defendants by their counterclaim asked for a declaration to the contrary.

Capewell K.C. and *Eric Blain* for the plaintiffs. This land is designated as part of the green belt in the Greater London Plan. But it has never been called a public open space. If sub-s. 6 of s. 10 is to operate, the Minister's decision (which is final) must state that the appeal is dismissed only because the land is to be reserved as a public open space. The decision in the letter of May 19, 1947, merely said that the land should remain unbuilt on. It would be a serious matter for the corporation if they were obliged to purchase this land, it would mean they could be obliged to purchase any land in the green belt on which it was sought to build houses. The advisory committee on London Regional Planning in 1946 stated that the green belt includes established centres of population, although it was still largely open country, and that it was not intended that all or even a large part of this area should be acquired outright by local authorities.

Williams K.C. and *Ramsay Willis* for the defendants. The plaintiffs' interpretation of sub-s. 6 of s. 10 would mean that the defendants are unable to use their land at all. All they would have is some right at some future date to compensation under a scheme, when it was eventually put into force. In order that sub-s. 6 should operate, there must be a finding of four things : (1.) that the appeal was dismissed on the ground only that the land was required for a public open space ; (2.) that the defendants were the owners in fee simple entitled to vacant possession ; (3.) that the land was suitable for immediate development, and (4.) that the defendants could have developed the land within a reasonable time. The Minister's decision shows that Worcester Park is meant to be included in the green belt, which includes public open spaces ; and the last paragraph of the decision would be meaningless and redundant unless it means that the land is to be purchased for a public open space. The question of development must have been argued before the Minister. Although the four essentials of sub-s. 6 are not to be found in terms in the decision, it is a necessary inference, reading the letter as a whole, that sub-s. 6 should operate.

Capewell K.C. in reply. The evidence is that this land was not to be a public open space. The Minister's letter is the judgment and award, and gives the terms on which the award is to be carried out. No inference can be drawn from that letter that this land should be a public open space. On the true construction of sub-s. 6, an appeal must be dismissed on the ground only that the land is required for a public open space, if the sub-section is to operate; the fulfilment of the other conditions of the sub-section is immaterial.

VAISEY J., having stated the facts, continued: The dismissal of the appeal was intimated to the solicitors for the defendants by a letter from the Ministry of Town and Country Planning, dated May 19, 1947, and admittedly it is upon the terms of that letter, having regard to the deductions which can be drawn from it, that the question in the present action must be determined. The letter is signed by a gentleman who describes himself as "an assistant secretary." I have no doubt at all that he was a person who was authorized to write this letter, and that its contents are in accordance with the instructions which were given to him and the authority which he possessed. He says: "I am directed by the Minister of Town and Country Planning "to state that he has considered the report of his Inspector, "Mr. S. T. Roberts"—the inspector who presided over this inquiry—"following the local inquiry into your clients' "appeal against the refusal of the Borough Council of Epsom "and Ewell to permit the development, as a residential state, "of land known as Worcester Park House Estate." Then, in the second paragraph he says: "Permission was sought to "develop 27 acres of this land by the laying out of streets and "the erection of 195 houses. This form of development "accorded with the Council's pre-war planning proposals for "the area, but those proposals are now under revision, and the "North-East Surrey Joint Planning Committee, which is the "body now responsible for the preparation of a planning scheme "for this area, intends that the whole of this land shall form "part of the Green Belt. This intention carries out the "recommendation made in the Greater London Plan for "the retention of an open wedge between the urban com-"munities of Surbiton and Epsom along the line of the "Hogsmill River and extending south-eastward in the direction "of the Worcester Park Brickworks. On the recommendation "of the Joint Planning Committee the application which forms "the subject of this appeal was rejected on these grounds."

The letter then goes on to say that the Minister had given careful consideration to all aspects of the appeal, and that he had reached the conclusion that the council's decision should be supported. I take it that the council's decision was that the appeal should be rejected on the grounds indicated. Then the letter continues : " He agrees that it is desirable to prevent " the coalescence of communities on the outer suburban fringe " of London and he is of opinion that this particular land which " forms a link between the Riverhill Estate to the north and " other open land to the south-east should remain unbuilt on. " He has decided, therefore, to dismiss the appeal, and this " letter is issued by the Minister as his formal decision on the " appeal."

On that paragraph I wish to point out two things. First of all, it indicates that what I may call the departmental opinion of the matter, is that the land should remain unbuilt upon ; the second thing to which I want to call attention is that this letter is to be taken as a formal decision.

It is the final paragraph, which gives rise to the doubt which exists in the present case. That paragraph reads as follows : " The Minister has considered the representations made to him " on behalf of the appellants that in the event of the appeal " being dismissed the land should be purchased forthwith in " accordance with the requirements of s. 10, sub-s. 6 of the " Town and Country Planning Act, 1932. He has considered " the Council's representations to the contrary but is unable " to accept their view that the applicants could not have carried " out this development within a reasonable period. I am, " therefore, to state for the purposes of s. 10, sub-s. 6, of the " Act of 1932 that the Minister is satisfied that if the appeal " had been allowed the development for which permission was " sought would have been carried out within a reasonable " period."

Of course, it is perfectly obvious that that paragraph is otiose, unnecessary and irrelevant, unless sub-s. 6 of s. 10 is to operate. There is great force in the argument which has been put forward on the part of the defendants, that it is a matter of necessary inference that the Minister must have been under the impression—when I say " the Minister " I mean, of course, the appropriate subordinate, but I will continue to say " the " Minister "—that that sub-section was operative and did apply to the present circumstances.

I return to the sub-section, and again consider what are the conditions which are the necessary pre-requisite of its coming into operation. It begins with these words: "Where an "appeal to the Minister under the last preceding sub-section "is dismissed on the ground only that the land to which the "appeal relates, though otherwise suitable for immediate "development, ought to be reserved by the scheme for a public "open space." Apart from the inference to be drawn from the final paragraph of the letter from the Minister, I cannot come to the conclusion that that was the only ground upon which the appeal was dismissed—that is to say, the ground that it ought to be reserved as a public open space. I think that the second paragraph of the letter, which states that the appeal was rejected on the grounds already acted upon by the plaintiffs, is contrary to any such view, and I cannot find that the desirability of reserving this land as a public open space was the ground for the dismissal at all. Still less am I able to find that it was the only ground. It seems to me that there is a complete absence of indication, other than the inference to which I have referred, that that ground was in the mind of the Minister at all, and, still less do I think that there is anything which could justify my saying that that is the only ground which influenced the mind of the Minister when he dismissed the appeal.

There is no doubt that, so far as the rest of the sub-section is concerned, he was satisfied that the development would have taken place in a reasonable period and that the ground was reasonably suitable for immediate development. There is no doubt that the defendants are entitled to the disposal of the fee simple of the land in vacant possession. The machinery of the appeal was properly set in motion, and, as I have said, the appeal has been dismissed. When, however, I come to the question of whether the appeal was dismissed on one ground, and on one ground only, I am unable to come to that conclusion. It is rather curious that this final paragraph was put in, but I think it can be explained in this way, that the point was expressly raised in the notice of appeal, and was, no doubt, discussed in the formal inquiry before Mr. Roberts. It may have been thought wise that an opinion on that particular point should be expressed, but I really cannot see why I must assume that the relevance of the point was guaranteed, as it were, by the Minister when he wrote this letter; indeed, I think it is a far too difficult conclusion to reach.

I hesitate to say that the onus of proof in this case is on the defendants, because that is a matter of somewhat ambiguous import, but I take the view that it is quite impossible for the defendants to succeed, unless I am satisfied that the conditions laid down by the sub-section are present, and I am not so satisfied. As far as I can make out from this letter, the council were never heard—or, at any rate, if they were heard, there is no finding on the point—on the most important question whether a public open space would be welcomed by them, or was required in this particular part of their area. Indeed, I think the only documentary evidence on the point is very much to the contrary—that they would not want a public open space on that particular corner; they did not want such a large area and they never considered such an open space. It is rather noticeable that in this particular district, of which the plaintiffs are the local authority, a very large area indeed—no less than 18 per cent. of the whole—is in fact made up of public open spaces. The area includes Nonsuch Park, Epsom Common and Epsom Downs, and there are various other open spaces, as shown by the key plan which was prepared for the purpose of the scheme, and that plan shows that this area is very well supplied with public open spaces. I should have thought that the argument in favour of another open space at the extreme north of the district being necessary or proper to be provided at the expense of the ratepayers is an argument which would require a very considerable amount of evidence to support it. As I have said, however, I cannot discover that the matter was ever referred to at all before the inspector, and I cannot help feeling that the final paragraph of the letter must have been put in out of courtesy to the arguments on the particular point which had been addressed to him, although, as I hold, it is quite unnecessary for the purposes of the decision. On any other ground on which the appeal was dismissed, except the particular one—the requirement that the land should be public open space—this last paragraph would have been absolutely unnecessary.

I am not at all sure that, apart from all this, the real substance of the case, from the point of view of the ratepayers and inhabitants of the Epsom and Ewell borough, is that they want to know whether their money is going to be spent on the acquisition of this land, and are they to have this additional area of public open space added to the various open spaces which are already existing in their district? I have no reason to suppose that they have ever been consulted, or that they know anything about it, and it would be a curious result

VAISEY J.

1948

EPSOM AND EWELL CORPORATION *v.* STREATHAM PROPERTY INVESTMENT LD.

if this action led to the inference being drawn from the final paragraph of the Minister's letter of May 19, 1947, that the plaintiff corporation were to be compelled to take on the burden of this land for a purpose for which, so far as I can see, they have always said they do not want it.

For these reasons, I think the action succeeds, and the defendants must pay the costs both of the action and of the counterclaim.

Judgment for the plaintiff on the action, counterclaim dismissed.

Solicitors for the plaintiffs: *Sharpe, Pritchard & Co., agents for E. Moore, Town Clerk, Epsom.*

Solicitors for the defendants: *Carleton-Holmes & Co.*

I. G. R. M.

JENKINS J.

1948

Oct. 22, 26, 27.

In re CASTLE, DECD.

PUBLIC TRUSTEE *v.* FLOUD.

Will — Construction — " Surviving " the happening of two events.

A testator, who died in October, 1891, bequeathed certain shares in his residuary estate to his trustees on the trusts contained in his will for his nephew and directed that if that nephew " shall pre-" decease me or shall be dead upon the happening of the event " aforesaid [the ' event aforesaid ' being the date (November 22, 1947) " of the death of the survivor of two daughters of the testator] " leaving issue of his own surviving me and the happening of the " aforesaid event then such issue shall take and if more than one " equally between them as tenants in common the share which " the [nephew] would have taken had he been then living."

Held, that the gift operated in favour of all issue of the nephew who were living on November 22, 1947, including those not born until after the death of the testator.

Elliott v. *Joicey* (*Lord*) [1935] A. C. 209 distinguished.

ADJOURNED SUMMONS.

In the events which happened and in consequence of the decision of the court on a previous question raised by this summons (which was taken out by the Public Trustee as the sole trustee of a will), certain shares in the residuary estate of a testator were held by the trustees of his will, dated

February 18, 1891, on the trusts therein contained for a nephew of the testator: " Provided always that if the said [nephew] " shall predecease me or shall be dead upon the happening of " the event aforesaid leaving issue of his own surviving me " and the happening of the aforesaid event then such issue " shall take and if more than one equally between them as " tenants in common the share which the [nephew] would " have taken had he been then living."

The testator died on October 20, 1891. His nephew died on December 28, 1937. The " event aforesaid " referred to in the above proviso was the death on November 22, 1947, of the survivor of two daughters of the testator.

The material question raised by the summons was whether in the events which happened of each of the two daughters of the testator dying without having been married the shares in question, as from the death on November 22, 1947, of the surviving daughter (*a*) became held on trust for the first three defendants in equal shares as the only issue of the nephew who were alive both at the date of the death of the testator and on November 22, 1947, or (*b*) became held on trust for all the descendants of the nephew living on November 22, 1947, in equal shares, whether or not they were alive at the death of the testator or (*c*) stood undisposed of by the will, or (*d*) became part of the estate of the said son and daughters of the testator under the terms of the will, and if so, in what shares and proportions.

Geoffrey Cross for the plaintiff.

Droop for the first three defendants. In this provision " surviving " means " living at my death and on November 22, " 1947." This meaning is supported by *Elliott v. Joicey (Lord)* (1). That being the proper meaning of the word " survive," cases such as *In re Clark* (2) and *In re Sing* (3) have ceased to be authorities on this point. To include a child born after the testator's death is to give a fictitional meaning to the word " survive." Moreover, the word " survive " is used four or five times elsewhere in the present will as meaning " living at the death," and it is therefore not possible to give anything but its proper meaning to the word " surviving."

J. A. Wolfe for a child of the nephew living on November 22,

(1) [1935] A. C. 209, 218.
(2) (1864) 3 De G. J. & S. 111.
(3) [1914] W. N. 90.

1947, but born after the death of the testator. Th prima facie meaning of the provision is that the survivor must live over the latter of the two events. Even if that is not the prima facie meaning, the words are capable of bearing that meaning, namely " surviving me or the other event." There is nothing in *Elliott* v. *Joicey* (*Lord*) (1) to prevent the court from placing a different construction on the phrase, if the words justify it.

Peter Foster for other defendants.

JENKINS J. The question I have to decide is whether the class of issue entitled to participate is confined to issue who were living at the death of the testator and also on November 22, 1947, or extends to the issue of the nephew, who were living on November 22, 1947, but were not born until after the death of the testator. The question turns on the meaning of the expression " surviving " in the construction of the particular will.

As to the prima facie meaning of the word " surviving " it must be regarded as settled by the House of Lords decision in *Elliott* v. *Joicey* (*Lord*) (1), that the prima facie and ordinary meaning of " surviving " is " living at and after the event " and requires that the person who is to survive shall be living both at and after a particular point of time. So that prima facie a gift to a class of individuals " surviving " an individual means a gift to persons of that class living at the event in question and does not extend to persons coming into existence after that event. One starts, therefore, with that prima facie meaning of the word " surviving," which suggests that no issue of the nephew survived the testator unless they were in existence at the death of the testator. But it is to be observed that here the requirement is that issue should survive not a single but a double event, i.e., both the death of the testator and the failure of the prior trust. It seems to me that this makes a material difference to the meaning of the word " survive." I think that, while fully accepting the meaning of living at the happening of the specific event, when the requirement is that two events should be survived, it can properly be satisfied by living at the happening of the last of the two events specified ; when, therefore, the requirement is to survive both the death of the testator and that of another named person, that requirement is met when a person is living at the date of the last of the events which has happened.

(1) [1935] A. C. 209, 219.

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Suppose that the prior trust had failed during the lifetime of the testator and that the nephew had had issue, after such failure but in the testator's lifetime, who survived the testator, it seems plain that such issue would be entitled to take by virtue of being alive at the death of the testator—the later event.

I think that is the proper construction of the word "surviving" in this case and that I am justified on the true construction of this will and without departing from the general meaning of the word "survive" in deciding that anyone living on November 22, 1947, although not born until after the testator's death is entitled to benefit. This conclusion is, I think, borne out by the general form of the provisions of the will. It is to be observed that the share which the issue is to take is the share which the nephew would have taken had he been living.

For these reasons I hold that on the true construction of this particular will the gift over operates in favour of all issue of the nephew who were living at the relevant date, including those not born until after the death of the testator.

Solicitors: *Druce & Attlee; Speechly, Mumford & Craig.*

J. L. D.

Considered. *In re* BIRKETT, DECD. [1950] 1 Ch. 330

In re JEEVES.

MORRIS-WILLIAMS *v.* HAYLETT.

VAISEY
J.

1948

Nov. 10.

Will—Construction—Division per stirpes or per capita—Direction that "my trustees shall pay and divide my residuary estate unto and "equally between the daughters of my late brother S. and to E. the "daughter of my sister."

The testatrix, who made her will in 1940 and died in 1948, by her will declared as to her residue that "my trustees shall pay and "divide the remainder of my residuary estate unto and equally "between the daughters of my late brother S. who shall be living "at the time of my decease and to E. the daughter of my sister O.," with a proviso that if any of her said nieces should have died in her lifetime leaving issue surviving the testatrix, such issue should take their parent's share. S. had five daughters, all of whom survived the testatrix. E. predeceased the testatrix, leaving three daughters who survived the testatrix. On a summons being taken out to determine whether the residue should be divided per stirpes into two

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moieties, one moiety being divisible equally among the daughters of S. and the other moiety being divisible equally between the daughters of E., or whether it should be divided per capita into sixth parts, one part going to each of the daughters of S., the remaining part being divisible equally between the daughters of E. :

Held, that on the true construction of the will the residue was divisible per stirpes.

In re Walbran [1906] Ch. 64, *In re Prosser* [1929] W. N. 85, *In re Cossentine* [1933] Ch. 119, *In re Alcock* [1945] Ch. 264, *In re Daniel* [1945] 2 All E. R. 101, *In re Hall* [1948] Ch. 437 and *In re Jeffrey* [1948] 2 All E. R. 131 considered.

Observations on the dictum of Sargant J. in *In re Harper* [1914] 1 Ch. 70, 76, that " the decisions in cases of this kind are rather " in the nature of guesswork."

ADJOURNED SUMMONS.

The testatrix, who died on April 23, 1948, in her will, dated September 9, 1940, directed that " my trustees shall pay and " divide the remainder of my residuary estate unto and " equally between the daughters of my late brother Samuel de " Vall who are resident in America and who shall be living at " the time of my decease and to Edith Martha Morris-Williams " the daughter of my sister Sarah Margaret Owens " followed by a proviso that " if any of my said nieces shall have died in " my lifetime . . . . leaving issue living at the date of my " decease who being male shall attain the age of twenty-one " years or being female shall attain that age or marry such " issue shall take per stirpes and if more than one equally " between them the share of my residuary estate which such " deceased niece would have taken had she survived me and " attained a vested interest." Samuel de Vall had five daughters, all of whom survived the testatrix. The niece Edith predeceased the testatrix, leaving three daughters who survived the testatrix. The question raised by the summons was whether the residue should be divided per stirpes into two moieties, one moiety being divisible equally between the daughters of Samuel and the other moiety being divisible equally between the daughters of Edith, or whether it should be divided per capita into sixth parts, one part going to each of the daughters of Samuel and the remaining part being divisible equally between the daughters of Edith.

T. K. Wigan for the plaintiff trustees.

J. A. Wolfe for the daughters of Edith.

W. T. Elverston for the daughters of Samuel.

[In the arguments reference was made to the cases cited in the judgment.]

VAISEY J. This case raises a question of a familiar kind and the answer to it, in my judgment, is not very easy to give. Counsel have referred me to a number of authorities, all of modern date, and I confess that whether they are reconcilable or not they do not either collectively or singly give me any sure guidance to a solution of the present problem. I think that one proposition emerges from their combined effect and from the observations of the learned judges by whom they were decided, namely, there is undoubtedly a prima facie rule that where there is a direction to divide, at any rate amongst persons of the same generation or standing in the same degree of relationship to the testatrix, the division is to be an equal division, that is to say, a division between the various beneficiaries per capita. In the present case there is undoubtedly some ground for saying that the testatrix was considering her nieces not as individuals but, if I may say so, by households. She puts the daughters of her brother into one household and the daughters of her sister into another. I do not feel that it would be capricious or unreasonable for her to say, if she did say it, that half her estate should go to her brother's daughters and that the other half should go to her sister's daughters. There would be nothing capricious in that, nor indeed is there anything capricious in the other view, which is that she wished to benefit all her nieces without distinction and without regard to whether they were children of her brother or of her sister.

I find myself in great doubt as to whether it is possible for me to discover with certitude which of the two views is that which the testatrix must be considered to have intended. I adopt the words of Sargant J. in the case of *In re Harper* (1), where he says: "The decisions in cases of this kind are "necessarily rather in the nature of guesswork." The only comment I would make upon that observation is that I do not think the word "rather" is wholly appropriate. I think these cases are almost always essentially and inevitably cases in which guesswork has to be employed in arriving at a proper solution of the difficulty. In addition to that case I have been referred to the following cases: *In re Walbran* (2), *In re Prosser* (3), a decision of Clauson J., *In re Cossentine* (4), a decision of Maugham J., as he then was, *In re Alcock* (5), a decision of Evershed J., as he then was, *In re Daniel* (6), a decision of my own, *In re Hall* (1), and finally *In re Jeffrey* (2). As I have said, from those cases I get some but not a great deal of assistance beyond the fact that there is undoubtedly a prima facie presumption that a division between persons of the same generation or standing in the same relationship to a testatrix ought to be a division per capita.

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(1) [1914] 1 Ch. 70, 76.
(2) [1906] 1 Ch. 64.
(3) [1929] W. N. 85.
(4) [1938] 1 Ch. 119.
(5) [1945] Ch. 264.
(6) [1945] 2 All E. R. 101.

Turning back to the words of the will, it seems to me that the arrangement of the words is somewhat inapt. The direction is for the payment and division of the residue unto and equally between the brother's daughters and to the sister's daughter. I have felt a great deal of doubt as to whether any word of equality of division is to be found in that sentence which extends and applies to the sister's daughter at all. I think the words grammatically read are equivalent to this, a direction to divide the estate unto the brother's daughters equally and to the sister's daughter. Undoubtedly that gives to my mind some indication pointing to a stirpital division, the brother's daughter taking one half equally between them and the sister's daughter taking the other half. I believe that the real problem before me now is to decide whether that is sufficient to displace the ordinary rule of a division per capita. It is not easy, in my judgment, to say on this will that either view could be rightly described as capricious. It may well be that the testatrix wished to benefit stocks of which the præpositi, if that is the correct word, were the brother and sister. It is equally likely that she regarded all her nieces with equal affection and with an equal claim upon her bounty. As I say, I think that a very close scrutiny of the words might result in there being enough in this will to favour the former of the two views. But I am not at all convinced that this way of looking at this kind of clause is very helpful and I myself take the view that it is pre-eminently a case of what Sargant J. described as guesswork. So treating it, I think, on the whole, that the curious collocation of words which appears to predicate equality only in relation to the children of the brother is sufficient to indicate that she was, in this case, thinking about her nieces not as individuals, but as households.

I propose to declare that the three children of Edith, niece of the testatrix, take a moiety of the estate equally between them and the five daughters of the brother take the other moiety of the estate in equal shares. I confess that I have come to this conclusion with a great deal of hesitation, but as

(1) [1948] Ch. 437.

(2) [1948] 2 All E. R. 131.

I am convinced that it is a matter of guesswork and as I am equally convinced that it is my duty in those circumstances to guess as best I can, I have formed a view and to that view, unless this matter is reviewed in a higher court, I must adhere. The costs of all parties as between solicitor and client will be taxed and paid out of the estate of the testatrix in due course of administration.

Declaration accordingly.

Solicitors for the plaintiffs: *Pontifex, Pitt & Co.*

Solicitors for the defendants: *Rowe & Maw; Churchill, Clapham & Co., agents for H. Vaughan Vaughan & Co., Builth Wells.*

F. R. D.

SELIGMAN *v.* DOCKER.

ROMER J.
1948
July 20, 21, 22, 23, 26; *Oct.* 22.

Nuisance—Birds feræ naturæ—Inordinate number in defendant's coverts—Damage to plaintiff's farm lands—Sporting rights exclusively in defendant—Plaintiff without right to shoot pheasants—Action for injunction and damages.

The defendant was at all material times entitled for a leasehold or other interest to (1.) the S. and P. farms of which the plaintiff was tenant from him and (2.) certain other farms and woodlands of which the defendant was in occupation. The plaintiff had become tenant of S. farm from the defendant's predecessor in title under two agreements dated August 6, 1942, under one of which the exclusive right of sporting and preserving game was reserved to the landlord. The defendant owned or had shooting rights over 4,230 acres, of which 2,326 were let to the plaintiff. Ninety per cent. of the pheasant shooting was in S. farm and P. farm. During the season 1947–1948 the defendant's coverts were filled wth an inordinate number of wild pheasants which in their search for food gravely damaged the plaintiff's crops. In an action by the plaintiff for an injunction restraining the defendant, his servants and agents from bringing on to any land occupied by the defendant and adjoining S. farm or on to S. farm itself and from allowing or encouraging to collect on the land or the farm unreasonable quantities of pheasants so as to injure the plaintiff, an injunction restraining them from unreasonable or excessive user of the sporting rights or the right of preserving game so as to injure the plaintiff, and damages in respect of the injury already caused:

Held, dismissing the action, (1.) that the presence of the large number of pheasants in the defendant's coverts or on and around S. farm was not due to any "unreasonable action" by the defendant within the meaning of those words as used by

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Scrutton L.J. in *Peech* v. *Best* [1931] 1 K. B. 1, 14, but was due to the exceptional weather conditions prevailing in the summer of 1947, particularly during May and June; (2.) that the defendant was not under a legal obligation to the plaintiff to reduce or disperse the pheasants when it became known that the number was so considerable. They were feræ naturæ and the fact that the plaintiff had no right to shoot them did not impose any duty in law on the defendant to shoot them himself.

Observations of Erle C.J. in *Hilton* v. *Green and Others* (1862) 2 F. & F. 821, at p. 826 considered and applied; *Giles* v. *Walker* (1890) 24 Q. B. D. 656 followed. *Farrer* v. *Nelson* (1885) 15 Q. B. D. 258, considered and distinguished.

ACTION.

The following statement of the facts is taken from his Lordship's written judgment.

By this action, the plaintiff, who was engaged in farming, sued for damages and an injunction in respect of injury done to his property in and after the autumn of 1947 by pheasants, which, he alleged, the defendant encouraged or permitted to collect in unreasonable numbers on his, the defendant's, land.

The lands which the plaintiff farmed were in or near the parish of Crawley, in the county of Southampton. He first came to this neighbourhood in 1933, when he bought a farm called New Barn Farm. He subsequently became tenant of other adjoining farms and in September, 1941, he became tenant from year to year from a Mr. Bassett, the defendant's predecessor in title, of Sandy Down Farm, which was the farm principally in question in these proceedings.

Two tenancy agreements were entered into, both dated August 6, 1942. Under each agreement there was excepted and reserved to the landlord, inter alia, " the exclusive right " of sporting and preserving game."

By one of those agreements it was mutually agreed that the landlord might regain possession of an area of grassland not exceeding twenty acres for game-rearing purposes in any year, allowing 1*l.* per acre for rent of same and paying compensation for loss of crops and damage and tenant right at valuation in the usual way.

In 1943, the plaintiff became tenant of the adjoining Park Farm. When he took over Sandy Down Farm there was a substantial amount of arable land on it which was later materially increased by bringing into cultivation some of the rough pasture land of which the rest of the farm consisted. There was very little of the latter left at the date of this action.

In 1944, the defendant purchased the freehold of the Heath House Estate, which included Sandy Down Farm and Park Farm. The estate also included other farms of which the plaintiff was tenant and unlet woodlands in or near the plaintiff's farms or some of them. The defendant owned or had shooting rights over 4,230 acres in all, of which 2,326 acres were let to the plaintiff. The shoot included approximately 1,000 acres of woodland and 90 per cent. of the pheasant shooting lay on Sandy Down Farm and Park Farm, the plaintiff's other farms being mainly partridge beats.

In the 1945/46 season, the defendant shot 531 pheasants, of which 369 were, according to the game-book, cocks. The area over which the shooting then extended was 2,344 acres. This area was increased by 1,810 acres before the 1946/47 season and during that season, 1,121 pheasants were shot, but the game-book did not distinguish between cocks and hens. During the season 1947/48, 2,441 pheasants were shot, and it was the plaintiff's case that an inordinate number of pheasants were congregated in the defendant's coverts during that season, that the defendant did not shoot them fast enough, and that they seriously damaged his crops in their quest for food.

Pascoe Hayward K.C. and *G. H. Newsom* for the plaintiff. The defendant ought to have prevented the increase in the number of birds by shooting more of them than he did. [They referred to *Hilton* v. *Green and Others* (1).] True, if a man does to his land something which causes wild animals or wild birds to collect on it, but which is a natural user of the land—see *Peech* v. *Best* (2)—a neighbour to whose land they do damage has no right of action, for he may lawfully kill them while they are on his land. In the present case, however, the plaintiff is "disarmed" and cannot kill the pheasants, for the defendant has the exclusive right to shoot them. It follows, therefore, that the defendant must neither bring the pheasants on to his own land in unreasonable numbers nor cause them to increase thereon in unreasonable numbers: *Farrer* v. *Nelson* (3). What is or is not "reasonable" is a question of law, to be decided in the light of, inter alia, the public interest and the national economy. The principle, supported by *Hilton* v. *Green and Others* (1), that a shooting tenant does not cause game to increase by simply not shooting it, is not correct.

(1) (1862) 2 F. & F. 821.

(2) [1931] 1 K. B. 1, 14.

(3) (1885) 15 Q. B. D. 258.

Alternatively, even if it is, a person who preserves game must, by shooting, keep it down to reasonable numbers. They referred to *Giles* v. *Walker* (1) and *Stearn* v. *Prentice Brothers, Ld.* (2).

The multiplying of the pheasants constitutes a nuisance. The defendant has not a right to commit a nuisance, and the mere possession of the exclusive right to shoot does not give him the right to commit a nuisance: *Sturges* v. *Bridgman* (3).

Sir Andrew Clark K.C. and *J. F. Bowyer* for the defendant. The defendant has not done anything "unreasonable" within the meaning of that word as used by Scrutton L.J. in *Peech* v. *Best* (4). The evidence shows that he did his best to keep the birds down. The fact that his keepers kept down vermin, thus allowing the pheasants to increase, cannot be said to amount to negligence. *Giles* v. *Walker* (1) makes the law on the matter clear, notwithstanding that it deals with thistles and not with animals feræ naturæ: and, just as an occupier of land is not bound to prevent thistles thereon from seeding, so is he not bound to prevent wild pheasants and other birds from straying on to his neighbour's land and damaging it. Even if the defendant had overstocked his land with pheasants, still the case would not come within *Farrer* v. *Nelson* (5). In that case the game was artificially brought on to the land and not put down on it. That was not so here: all that did happen was that the defendant's keepers were zealous in keeping down vermin, with the result that the pheasants bred in numbers probably greater than they would otherwise have done.

Pascoe Hayward K.C. replied.

Cur. adv. vult.

1948. Oct. 22. ROMER J. read a judgment in which he stated the facts as set out above and continued:

That such damage as occurred was in substance caused by pheasants I unhesitatingly accept, notwithstanding other alternative causes that were suggested in the course of the evidence.

Before referring in further detail to the facts of this case, I propose to inquire into the relevant legal principles and to such authority as there appears to be on the subject. The

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(1) (1890) 24 Q. B. D. 656.
(2) [1919] 1 K. B. 394.
(3) (1878) 11 Ch. D. 852.
(4) [1931] 1 K. B. 1, 14.
(5) 15 Q. B. D. 258.

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first case to which I was referred was *Hilton* v. *Green and Others* (1). The plaintiff in that case had a tenancy of a farm and a limited interest in relation to an adjoining wood called Buckley Wood, namely, the right to take the underwood. The defendants had the shooting rights both over the farm and over the wood, and they or their agents put rabbits on to the farm and wood, in order to increase the natural stock and improve their shoot. The plaintiff sued for damage done to his crops by rabbits.

In his charge to the jury, Erle C.J. expressed himself as follows (2): " The defendants can only be liable for rabbits " turned on, or for the growth and progress of rabbits turned " on, and not for the mere natural increase of rabbits already " on the farm; for it is no ground of action that rabbits are " not destroyed. The ground of action is the turning on " rabbits; and the defendants can only be liable for rabbits " turned on with their express or implied authority, or with " their sanction and approbation, or for the increase of rabbits " so turned on."

In a further passage, Erle C.J. says (2): " Then, again, you " can only in this action find against the defendants for damage " done by rabbits turned on to the *farm*, not as to rabbits " turned into Buckney Wood, which was no part of the plaintiff's " holding. For, if rabbits were put into the wood, and thence " strayed into the farm, the defendants would not be liable for " the injury they caused. But, as regards rabbits turned on to " the *farm* by the direction of the defendants, they would be " liable, because the leave to *shoot* on the farm implied no right " to put rabbits into the farm. That hundreds of rabbits *were* " turned on to the farm there can be no doubt. The question " is whether they were so turned on with the sanction and " authority of the defendants." It is to be observed that the defendants' rights over the plaintiff's farm were apparently limited to shooting and did not extend to preserving.

In *Farrer* v. *Nelson and Another* (3) the facts were as follow. In 1881 the plaintiff became tenant from one Strickland of a certain farm, but the shooting rights were reserved to the landlord. Strickland subsequently let to the defendants the shooting and sporting rights over his estate, of which the farm leased to the plaintiff formed part. During the spring, summer and autumn of 1884, the defendants, by their gamekeepers, reared in coops elsewhere than on the plaintiff's land but on another part of Strickland's estate about 1,500 pheasants and had carried in the coops about 450 of these pheasants into a coppice wood, which was situate on the plaintiff's farm but was reserved to the landlord in the plaintiff's lease. This coppice wood covered an area of approximately 80 acres, and about an acre of it had been cut down for the purpose of rearing pheasants, into which the 450 pheasants were brought; and the part of the coppice wood so cut down adjoined to within about five yards of the fence dividing the coppice wood from a field of the plaintiff, which was about 27 acres in area. The plaintiff sued for damage done by the pheasants to his crops in this field. It was admitted by the defendants that 300 to 400 pheasants had been placed as before mentioned and that some of these pheasants had from time to time come out of the wood and alighted upon the plaintiff's farm and, by feeding upon his crops, had done damage to the amount claimed in the action. The county court judge held that the plaintiff was entitled to recover the amount of the damage so occasioned and gave judgment for the plaintiff for the amount claimed by him. The defendants appealed to the Divisional Court, and it was argued on their behalf that they had the right of shooting over the land and that it was necessary for the reasonable enjoyment of that right that they should be at liberty to stock the land with pheasants. Pollock B. in delivering the leading judgment of the court, observed that the case was new and interesting, but that he entertained no doubt that the decision of the county court judge was, in law, correct. He then proceeded as follows (1): " I will first deal with the question whether an " action can be brought by a neighbour against any person who " collects animals upon his land so as to injure the crops of the " neighbour, and I should say that beyond doubt such an action " would lie, and that the rule upon which it would be founded " would be not so much negligence as upon an infraction of the " rule ' sic utere tuo ut alienum non lædas.' I agree, however, " that this does not solve the question before us. It is not " merely the case of a man collecting noxious animals upon his " land so as to injure his neighbour, but the case of a man " entitled to keep game upon the land, and the tenant com- " plaining of injury to his crops from this game being unduly " multiplied. As I understand the law each person in this " country is entitled to bring on his land any quantity of game

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(1) 2 F. & F. 821.

(2) Ibid. 826.

(3) 15 Q. B. D. 258.

(1) 15 Q. B. D. 258, 260.

"which can reasonably and properly be kept on it, and so that "nothing extraordinary and non-natural is done. The case "of *Birkbeck* v. *Paget* (1) which was cited by the counsel for "the defendants to show that there is a difference between "introducing fresh game and shifting game from one part of "the land to another, is at any rate an authority that the "lessee is not warranted in introducing into the land game not "bred in the ordinary way. So here, so long as the lessee of the "right of shooting was exercising the ordinary rights which the "landlord who had reserved the right might have exercised, "he was acting within his rights, but the moment he brings on "game to an unreasonable amount or causes it to increase to "an unreasonable extent he is doing that which is unlawful, "and an action may be maintained by his neighbour for the "damage which he has sustained." Day J. concurred.

It appears to me that the essence of that case lies in the fact that the pheasants which caused damage for which the defendants were held liable were not birds which were upon the defendants' land in the ordinary course of nature, but birds which had been artificially introduced on to the land by the action of the defendants themselves.

In *Giles* v. *Walker* (2) the defendant, a farmer, occupied land which had originally been forest land, but which had, some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles, but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for the damage in the county court and, upon the jury finding that the defendant was negligent in not cutting the thistles, judgment was entered for the plaintiff. On appeal to the Divisional Court, the plaintiff sought to uphold the judgment by arguing that, if the defendant's predecessor had left the land in its original condition as forest land, the thistles would never have grown, that, by bringing it into cultivation and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them, and the defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour.

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(1) (1862) 31 Beav. 403.

(2) 24 Q. B. D. 656.

This argument, however, was rejected by the court and the appeal was allowed. Lord Coleridge C.J. said (1): "I never "heard of such an action as this. There can be no duty as "between adjoining occupiers to cut the thistles, which are "the natural growth of the soil." Lord Esher M.R. was of the same opinion.

In *Stearn* v. *Prentice Brothers, Ld.* (2), the defendants, who were bone manure manufacturers, were sued for damages on the ground that their factory caused rats to collect, which damaged the crops on the plaintiff's adjoining land. The action was dismissed in the county court and the plaintiff appealed. The Divisional Court dismissed the appeal on the ground that there was no evidence of anything unusual or excessive done by the defendants, who carried on an ordinary business in an ordinary way. Bray J. in the course of his judgment (with which Avory J. agreed) referred to certain authorities. He said (3): "The earliest is *Boulston's* case (4). It was there held that, "'if a man makes coney-boroughs in his own land, which "'increase in so great number that they destroy his neighbour's "'land next adjoining, his neighbour cannot have an action on "'the case against him who makes the said coney-boroughs; "'for, so soon as the coneys come on his neighbour's land, "'he may kill them, for they are feræ naturæ, and he who "'makes the coney-boroughs has no property in them, "'and he shall not be punished for the damage which the "'coneys do in which he has no property, and which the other "'may lawfully kill.' That was an action in the case as here, "and seems to be directly in point. I am not aware that this "decision has ever been overruled or questioned. It was "approved and followed in *Brady* v. *Warren* (5.) It was "cited in *Farrer* v. *Nelson* (6), a case relied on by the plaintiff. "There, the plaintiff was tenant to the defendant of a farm, "the defendant reserving the right to kill game. The "defendant had reared large quantities of pheasants and had "turned them down in a wood adjoining the plaintiff's land, "whence they had strayed on to the plaintiff's land and

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(1) 24 Q. B. D. 656, 657.

(2) [1919] 1 K. B. 394.

(3) Ibid. 396.

(4) (1597) 5 Co. Rep. 212.

(5) [1900] 2 I. R. 632.

(6) 15 Q. B. D. 258.

" damaged his crops. This, of course, was clearly distinguishable from *Boulston's* case (1), as the defendant had deprived " the plaintiff of his right to kill or destroy the pheasants . . . . " That case does not, in my opinion, support the plaintiff's " proposition. *Rex* v. *Moore* (2) and the cases which followed " it, all cases of nuisance, were cited to us. They lay down that " if a person collects together a crowd of people to the annoyance " of his neighbours, that is a nuisance. These cases are clearly " distinguishable in my opinion. The plaintiff could not kill " the crowd or stop them. The crowd are not feræ naturæ." The learned judge then referred to and distinguished *Bland* v. *Yates* (3), which was a case where an unusual and excessive collection of manure was held to be an actionable nuisance.

The judgment to which I have just referred clearly points the distinction between cases in which the person injured by animals feræ naturæ has the right to kill them himself and cases in which he has not. In the case before me, the plaintiff had not the right to shoot the pheasants which came on to his land ; but it is scarcely true to say, in the language of Bray J., that the defendant had deprived him of the right. A man cannot be deprived of a right which he has never had. So far as the plaintiff's farms are concerned, the plaintiff never had the shooting rights over them, for they were reserved out of the grant to him of the farms. It cannot, therefore, strictly be said that he was " deprived " of those rights by the defendant or anyone else. It is, however, true to say that, in as much as he was not entitled, and therefore not lawfully able, to kill the pheasants himself, the principle of *Boulston's* case (1) does not apply.

In *Peech* v. *Best and Others* (4) Scrutton L.J. made the following observations upon *Farrer* v. *Nelson* (5) : " In *Farrer* v. " *Nelson* (5) a sporting tenant who brought an unreasonable " number of pheasants on the land, which injured the crops, " was held liable in damages. This apparently shows that both " landlord and sporting tenant must use their land reasonably " having regard to the interest of the other, and will be liable " for damage caused to the other by extraordinary, non-natural, " or unreasonable action."

Upon the above cases, counsel for the plaintiff submitted the following propositions : (1.) If a man does something on his land which causes wild animals or birds to collect on it, his neighbour generally has no remedy if the animals or birds come out on to his land and do damage; but this is subject to the proviso that the user of the land is a natural user and it is conceded in the argument that the preserving of game for shooting purposes is such a user. (2.) The rule is based on the fact that the person whose land is injured may lawfully kill the wild animals or birds which are doing the injury. (3.) The principle has no application in cases like the present where, under an agreement or grant, the right to shoot game over particular land is vested in some person other than the occupier. In such a case the occupier is " disarmed " by the contract; that is to say, he is debarred from shooting the invading animals or birds himself. (4.) Consequently, in such a case the law imposes on the person who enjoys the shooting rights the duty not to bring on to the land in question or adjoining land of his own game to an unreasonable extent and not to cause the game to increase to an unreasonable extent. (5.) The question of what is reasonable or unreasonable is a question of law and the interests of the public and the general economy of the nation are amongst the considerations which are relevant to its decision. (6.) There is some authority (for example, *Hilton* v. *Green and Others* (1)) for the view that a shooting tenant does not cause game to increase merely by omitting to shoot it. It was submitted that this view is wrong; but, even assuming its accuracy, it was contended that, if a man preserves game, he is under an obligation to shoot sufficiently intensively to keep the game down to reasonable numbers.

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(1) 5 Co. Rep. 212.

(2) (1832) 3 B. & Ad. 184.

(3) (1914) 58 Sol. J. 612.

(4) [1931] 1 K. B. 1, 14.

(5) 15 Q. B. D. 258.

It is, of course, quite clear that, when the plaintiff took his tenancy agreements of Sandy Down Farm in August, 1942, he knew that the coverts on his landlord's estate (some of them lying within the plaintiff's farms) were intended to be used for the preserving and shooting of pheasants; and it was, indeed, for the furtherance of that very purpose that the sporting rights were reserved from the grants to the plaintiff. Such a purpose was calculated to injure the plaintiff's crops in some degree, especially as the artificial feeding of pheasants was, when the agreements were entered into, prohibited. As against the possibility of such damage occurring, however, the plaintiff had the advantage of a somewhat reduced rent and the protection afforded by s. 11 of the Agricultural Holdings Act, 1923.

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(1) 2 F. & F. 821.

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In the light of these circumstances, it is, in my opinion, clear that the plaintiff, although "disarmed," could have no right to complain at common law merely because some damage (slight but definite) was occasioned to him by the pheasants in the defendant's coverts.

At what point then, or in what circumstances, does such a right arise, assuming that it is capable of arising at all? I think the answer is to be found in the passage already quoted from the judgment of Scrutton L.J. in *Peech* v. *Best* (1): the defendant would be liable to the plaintiff for damage caused by "extraordinary, non-natural or unreasonable "action." The Lord Justice, in this passage, was expressing his views of the effect of *Farrer* v. *Nelson* (2), but he indicated no disapproval of that effect and was, as I think, expressing also his own view of the law. If I may respectfully say so, that view seems quite consistent with the other cases to which I have referred, and I propose to apply it to the circumstances of the present case. It is not suggested that any action by the defendant was "extraordinary" or "non-natural," and the question, therefore, narrows down to this: was the damage of which the plaintiff complains caused by any unreasonable action by the defendant?

I am quite unable, on the evidence, to hold that the presence of what was admittedly a large number of pheasants in the defendant's coverts, or on and around Sandy Down Farm, last autumn was due to any unreasonable action on the part of the defendant. He had not, at any time since 1944, bought or put down any eggs or young birds or any artificial stock on his shoot. The only thing of this kind at all that happened was when, as occurred occasionally during haymaking, hen birds were killed on their nests and the chicks, which would have otherwise perished, were saved by the defendant's keepers and put under hens. In the spring of 1947, some thirty-five to forty birds were saved in this way. Apart from this (of which clearly no complaint could be made by the plaintiff), the whole of the pheasants on the defendant's shoot were wild, a fact which, in my judgment, very materially distinguishes this case from *Farrer* v. *Nelson* (2).

What, then, was responsible for the presence in the autumn of 1947 of wild pheasants so much in excess of those which had been found in any previous year? I am satisfied that it was not due to an unreasonably large stock having been left

(1) [1931] 1 K. B. 1, 14.

(2) 15 Q. B. D. 258.

after the close of the shooting season, 1946/47. As to this, the defendant estimated that the breeding stock after that season was much the same as what had been left at the end of the previous shooting season. Nicholson, his head keeper, corroborated this and expressed the view that the stock was about six hundred birds in the spring of 1946 and a similar number in the spring of 1947. There was no evidence that the proportion of cocks to hens in the breeding stock was higher in 1946 than it was in 1947. No complaint was made that there were too many pheasants on the defendant's shoot in the autumn of 1946, and I find accordingly that the increase which occurred in the following autumn was not due to an increase in the breeding stock left at the beginning of the season and far less was it due to an unreasonable increase in such stock.

The question then arises why the breeding stock in the spring of 1947 resulted in so many more birds reaching maturity than was the case with the approximately equivalent stock the previous year. The evidence which was given upon this point leads to one conclusion and one conclusion only, and that is that it was due to the exceptional weather conditions which prevailed in Hampshire, as elsewhere, in the summer of 1947 and particularly during the very important months of May and June.

[His Lordship discussed the evidence on this point and continued :] As, therefore, I hold first, that there was not an excessive breeding stock left on the defendant's shoot in the spring of 1947, and, secondly, that the extraordinary number of mature birds which resulted from this stock was due to the wholly exceptional climatic conditions of that year, it would be impossible, in my judgment, if no other point were taken, to find any unreasonable action by the defendant, so far as the number of birds is concerned, upon which an action could be founded.

It was, however, argued on behalf of the plaintiff that a substantial contributory cause of the increase in mature birds in 1947 lay in the fact that the defendant employed keepers. The argument, as I understand it, was that, assuming that the defendant could not be held liable if he had employed no keepers at all, nevertheless the employment of any whole-time keepers (even one) is sufficient in itself to fix him with liability, for the reason that, but for the keeper or keepers, some of the birds would have fallen victims to stoats and other vermin and the ultimate numbers which damaged the crops in the autumn would thereby have been reduced. I find this a difficult argument to accept. It is impossible to suppose that there is anything unreasonable in the owner of a shooting estate keeping one or more gamekeepers for the purpose of preserving the game and I should imagine that the plaintiff is the last person who would be likely to express any such view. He did not in fact do so, but thought that the defendant employed too many. Apparently in 1945 there were two keepers and the number increased as the shoot increased and as men returned from the services, until in the summer of 1947 there were five keepers, in addition to the head-keeper, one of whom left in September. I have no reason to suppose that these numbers were in any way unreasonable or excessive for a shoot of this size, and it certainly was in no way proved to my satisfaction that this was so. I am, accordingly, unable to accept the argument which was addressed to me on behalf of the plaintiff upon this aspect of the matter.

I would add at this point that Mr. Bray (the secretary of the Hampshire War Agricultural Executive Committee), in his evidence, was emphatic that the trouble was due not so much to the number of the pheasants in the defendant's shoot, but to the fact that they concentrated in three or four particular places. Mr. Ingram, a chartered surveyor called by the plaintiff, also drew attention to these concentrations. It is reasonably plain, in my opinion, that the congregation of the birds in a few favoured localities was due to topographical conditions; and I accept the view which Nicholson advanced in his evidence that birds always seem to flock to a sunny part of the beat. He said (and I believe him) that he never did anything to induce them to concentrate in any particular way. It accordingly follows that the effective cause of the damage, as the matter presented itself to Mr. Bray, was not one for which the defendant's keepers were responsible. The result of what I have so far said is that, in my judgment, the presence in the defendant's coverts or the plaintiff's farms in the autumn of 1947 of an unprecedentedly large number of pheasants, and their concentration in particular areas, was not due to any unreasonable conduct or action on the part of the defendant.

The next subject for inquiry is whether the defendant owed a duty to the plaintiff to reduce or disperse the pheasants when it became known that their numbers were so considerable and, if so, whether or not he failed in that duty so as to give the

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plaintiff a legal right of complaint. I approach this inquiry on the hypothesis, as already indicated, that the presence of these pheasants in such large numbers on the defendant's land had not been brought about by any unreasonable conduct or action on his part. In these circumstances, was he under a legal obligation to the plaintiff to reduce them and, if so, how quickly and to what extent ?

In the absence of authority, I am not prepared to hold that he was under any such obligation. The birds were feræ naturæ and I am unable to see that the fact that the plaintiff had no right to shoot them imposed any duty in law upon the defendant to shoot them himself. It may be that the number of pheasants would have been less in some degree had the defendant employed no keepers and that, by employing them (though lawfully and reasonably), the defendant had to some extent interfered with the ordinary course and processes of nature. The employment of a reasonable number of keepers was not, however, in my judgment, equivalent to the bringing by the defendant of birds on to his land or unreasonably causing them to increase so as to attract the liability and obligations which such action would, on the authorities, have entailed. In my view, the observations of Erle C.J. in *Hilton* v. *Green and Others* (1) and the decision in the " thistle " case, *Giles* v. *Walker* (2), alike show that the defendant was under no legal liability to destroy the pheasants which were present upon his land. Having regard to this conclusion, it becomes unnecessary for me to deal with the contention of the plaintiff that the defendant did not shoot, in the 1947/48 season, as intensively as he ought to have done, for the contention postulates a duty upon the defendant from which I have held that he was free.

I am not without sympathy for the plaintiff, who unquestionably suffered damage last season and underwent serious trouble and inconvenience as well. Some of it may well be recoverable under the application which the plaintiff has made and which was suspended by reason of these proceedings, under the Agricultural Holdings Act, 1923. Section 11 of that Act is specifically directed to circumstances such as those of the present case, and presumably reflects the legislature's views as to what compensation is properly payable to persons in the position of the plaintiff.

Be that as it may, I must apply to this case what I conceive

(1) 2 F. & F. 821.

(2) 24 Q. B. D. 656.

to be the law and, so applying it, I have no alternative but to dismiss this action, with the usual consequences.

Action dismissed.

Solicitors: *Cunliffe & Airy, for White, Nash & Brooks, Winchester; Preston, Lane-Claypon & O'Kelly, for Evershed & Tomkinson, Birmingham.*

K. R. A. H.

WYNN-PARRY J.
1948
Oct. 27.

In re BOWEN.

TREASURY SOLICITOR *v.* BOWEN.

Will — Construction — Contingency — Gift over in event of testator's uncle dying in lifetime of testator's mother—Testator's mother died before his uncle, but both predeceased testator—Whether gift over effective.

A testator by his will gave " my real and personal estate . . . . " to my trustees upon trust for my dear mother during her life " and from and after her decease upon trust for my uncle E. B. " subject to [two legacies of 100*l.* each] . . . . In the event of " my said uncle E. B. dying in my mother's lifetime then I give " my said real and personal estate subject to and charged as " aforesaid to his children as tenants in common in equal shares." E. B. survived the testator's mother and predeceased the testator.

Held, that on the true construction of this will it was the clear intention of the testator that E. B.'s children should take if E. B. were dead at the date of distribution and therefore, although E. B. had not died in the lifetime of the testator's mother, there was no intestacy and the residuary estate became divisible between the children of E. B.

Jones v. *Westcomb* (1711) Prec. Ch. 316 and *In re Fox's Estate* [1937] 4 All E. R. 664 applied.

In re Graham [1929] 2 Ch. 127 distinguished.

FURTHER CONSIDERATION.

By his will dated January 2, 1931, the testator David Bowen gave " my real and personal estate . . . . to my trustees " upon trust for my dear mother during her life and from and " after her decease upon trust for my uncle Evan Bowen subject " to and charged with [two legacies of 100*l.* each]. In the " event of my said Uncle Evan Bowen dying in my mother's " lifetime then I give my said real and personal estate subject "to and charged as aforesaid to his children as tenants in "common in equal shares."

The testator died on March 16, 1941. His mother predeceased him and his uncle Evan Bowen also predeceased him, though he survived the testator's mother. A summons having been taken out for administration, an order was made on April 23, 1945, but, as no declaration was made therein that the Crown was entitled as bona vacantia to all the property of the testator as to which it was alleged that he had died intestate, the summons came on for further consideration, so that the court might determine whether, as the testator's mother predeceased his uncle (and both of them predeceased the testator) the provisions of the will had not been carried out and the gift to the children failed.

McMullen (*Danckwerts* with him) for the Treasury Solicitor. There has been an intestacy as regards the gift over to the children of Evan Bowen, as the exact event on which the gift over in their favour (namely, the death of their father in the lifetime of the testator's mother) was expressed to take effect has not happened. [He referred to *In re Graham* (1).]

H. E. Francis for one of the children of the testator's uncle, Evan Bowen. The testator clearly intended that the children of his uncle should take if their father were dead at the date of distribution. The words "in my mother's lifetime" were merely inserted in the will as a measure of her life interest. The case comes within the principle in *Jones* v. *Westcomb* (2). [He also referred to *In re Fox's Estate* (3) and *Davies* v. *Davies* (4).]

WYNN-PARRY J. It is clear that the exact event on which the gift over in favour of the children of Evan Bowen was expressed to take effect, namely, the death of Evan Bowen in the lifetime of the testator's mother, has not happened. In those circumstances it has been contended for the Treasury Solicitor that there is an intestacy. For the defendant it has been argued that the testator must a fortiori have intended, in the events which have happened, that the children of Evan Bowen should take.

The argument for the defendant is based on the well-known rule in *Jones* v. *Westcomb* (2) which was considered by the Court

(1) [1929] 2 Ch. 127.
(2) (1711) Prec. Ch. 316.
(3) [1937] 4 All E. R. 664, 668.
(4) (1882) 47 L. T. 40.

of Appeal in *In re Fox's Estate* (1). In the latter case a "testator gave all his 'substance' to his executors upon trust "as to one quarter for his daughter F. S. for her separate use, as "to one other quarter for his daughter A. C. for her sole use for "life, and thereafter for her children if she leave any equally, "as to another quarter for the children of his deceased son G. J. "equally, and as to the last quarter for W. S. and T. S. The "testator declared that the benefits under his will should become "vested on the coming of age of the legatee, and that any "legacy which by the death of any person should lapse should "go to F. S. A. C. survived the testator but died without ever "having had any children, and her share lapsed for that reason. "The question raised was whether the gift over to F. S. upon "lapse by reason of the death of any person took effect in "these circumstances: Held: (i.) the one quarter given to "A. C. did not lapse by the death of any person, but for the "reason that A. C. had never had any children: (ii.) the gift "over took effect under the rule in *Jones* v. *Westcomb* (2), "that, by necessary implication, the testator must be taken to "have made provision for the event which had happened as "well as for the lapse by reason of the death of any person: "(iii.) 'lapse' in this will did not refer only to the failure of a "gift by reason of the death of a legatee in the testator's "lifetime." In the course of his judgment Romer L.J. said: "That being so, it appears to me that the principle applied "in the case of *Jones* v. *Westcomb* (2) comes properly into "operation. That principle is stated in this way in Theobald "on Wills (10th ed., p. 456) and I think it is rightly stated "there: 'There is, however, a class of case where, though the "'exact event upon which the gift over is to take effect does "'not happen, the gift over must a fortiori have been intended "'to take effect in the event which happens.' The principle "is applicable, therefore, only in those cases where the court, "looking at all the relevant circumstances of the case, including, "of course, the will itself, comes to the conclusion that the "testator must a fortiori have intended the disposition over to "take effect in the event which has actually happened, although "it is not the event which he has specified in his will as the "one in which the gift over is to take effect. Looking at all "the circumstances of this case, can anyone doubt for one "moment that, if the testator had been asked what was to "happen to this share of Mrs. Perry if she died without ever

(1) [1937] 4 All E. R. 664, 668.
(2) Prec. Ch. 316.

"having had a child at all, the testator would have said: "'A fortiori the share is to go to my daughter Fanny.' I agree, "therefore, that the appeal must succeed."

In applying the principle enunciated in *Jones* v. *Westcomb* (1), the courts have considered what was the real contingency guarded against, and an example of this is afforded by *Davies* v. *Davies* (2). In that case "a testator, by his will, gave his "residuary estate upon trust for his wife for life, provided she "should survive him twelve months and remained unmarried, "and he gave to his wife power to dispose by will of one-half "of the estate, and gave the other half after her decease to his "sister J., or, in case of her predecease, to other persons; "and he directed that, in case of his wife dying within twelve "months from his own decease, his whole estate should go to "his said sister, with a gift over as before in case of her predecease, and he made a similar provision with respect to "one-half of the estate in the event of his wife omitting to "make a will. The testator's wife died in his lifetime, and "his sister J. survived him. Held: that the contingencies "against which the testator guarded, and which the court, in "construing the will, was bound to regard, were the event of "his wife not being alive at the expiration of twelve months "from his own decease, and the event of their being no "testamentary disposition by her, and that, in the events which "had happened, the gift over in favour of the testator's "sister took effect." Fry J. in the course of his judgment said (p. 42): "Coming back again to the two classes of "contingencies the first is undoubtedly expressed in these "words: 'In case of my wife Frances Mary Davies dying "'within twelve months of my decease.' That undoubtedly, "in my judgment, contemplates two things, first the wife "surviving the testator, and, secondly, her dying within the "twelve months. I come to that conclusion because, according "to my understanding of the words, a person dying within the "twelve months does not literally mean a person dying before "the end of the twelve months, but it means being alive at the "beginning and dead at the end of the period. That observation does not conclude the matter, because in all these "cases the court has to inquire what is the real meaning and "object of the clause, what, as has been said in several cases, "is the contingency guarded against? Now what, I ask "myself, is the contingency guarded against here? Is it the

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(1) Prec. Ch. 316.

(2) 47 L. T. 40.

"contingency of the wife living after the testator, and then "dying within that period; or is it the contingency of the "wife not being alive at the expiration of that period? I have "already stated that, according to my view of the general scope "of the will, it is the latter and not the former, and it is "difficult to frame to oneself any reason why survivorship of "the wife for a day should be essential for the sister taking the "entire interest in this property. The contingency that the "testator contemplated was the wife's living or her having died "at the expiration of the twelve months, and, if the court "comes to that conclusion, there is no difficulty whatever in "giving effect to the obvious intention of the testator."

It becomes necessary, therefore, to consider in the light of the will and the relevant circumstances what was the real contingency which this testator contemplated when making the gift to the children of Evan Bowen. In the present case the relevant circumstances are these: The testator's only next of kin was his mother and, apart from her, it appears that his nearest natural relations were his uncle, Evan Bowen, and his uncle's children. He appointed two of these children, including the defendant, to be executors of his will. By his will he gave a life interest only to his mother, and after her death he gave his estate (charged with the payment of certain legacies) to his uncle. The gift to the uncle was not conditional. He then proceeds as follows: "In the event of my said uncle "Evan Bowen dying in my mother's lifetime then I give my "said real and personal estate subject to and charged as afore-"said to his children as tenants in common in equal shares." It was contended for the defendant that the words "in my "mother's lifetime" were introduced simply as a measure of the life interest of the mother, and that the plain intention of the testator was that the uncle's children should take if the uncle was dead at the date of distribution.

Putting aside for the moment *In re Graham* (1) which is relied on by the plaintiff, I feel no difficulty in applying the test adopted by Romer L.J. in *In re Fox's Estate* (2) in the present case. If the testator had been asked what was to happen to his residuary estate if the uncle was alive at the death of the mother, but had died in the testator's lifetime, I think he would unhesitatingly have said: "Then, of course, the children are "to take." It seems to me, therefore, that prima facie this

(1) [1929] 2 Ch. 127.

(2) [1937] 4 All E. R. 664.

case, when properly examined, falls within the principle of *Jones* v. *Westcomb* (1).

It remains to consider *In re Graham* (2). The headnote is as follows: "By her will, after giving life interests to her "parents, a testatrix devised and bequeathed her real and "personal estate to her husband, but if he should have predeceased both her parents, then to her husband's children, "whether by herself or his first wife. The husband survived "both the parents, but predeceased the testatrix. The testatrix left no issue of her own, but at her death there were six "children of her husband's first marriage living: Held: "there was no implication of a gift over to those children on "failure of the gift to the husband by lapse in any event, and "therefore the residuary estate of the testatrix was undisposed "of and passed to her next of kin." It appears from the judgment that the learned judge treated the gift to the husband in that case as conditional, because he said (at p. 130): "The "husband had satisfied the condition of the gift in the lifetime "of the testatrix." In the case now before me it appears to me, on the true construction of this will, that the gift to the uncle was not conditional. I think that the case of *In re Graham* (2) is distinguishable, and I feel free to apply the test indicated by Romer L.J. in *In re Fox's Estate* (3).

In my judgment therefore the principle of *Jones* v. *Westcomb* (1) applies here, and I hold that, on the true construction of this testator's will, there is no intestacy and that his residuary estate became divisible equally between the children of Evan Bowen.

Declaration accordingly.

Solicitors: *Treasury Solicitor; T. D. Jones & Co., for Jeuan J. Luke, Newcastle Emlyn.*

(1) Prec. Ch. 316.
(2) [1929] 2 Ch. 127.
(3) [1937] 4 All E. R. 664.

J. L. D.

In re SEARLE, DECD.
SEARLE *v.* SIEMS AND OTHERS.

ROX-
BURGH
J.

1948

June 30.

Family provision—Will—Application prior to grant of representation—Reason given in will for omitting to make provision—Admissibility of evidence of other reasons—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45) *s.* 1, *sub-s.* 7 ; *s.* 2, *sub-s.* 1—*R. S. C. Or.* 54F, *r.* 2 ; *Or.* 70, *r.* 2.

By his will a testator made no provision for his wife but stated a reason for that omission. He died on October 29, 1946 and on March 18, 1947 the plaintiff, who was his widow, applied for provision under the Inheritance (Family Provision) Act, 1938. No representation was taken out until May 6, 1947, when probate of the will was granted. At the hearing the defendant contended that the application was a nullity because it was made prior to the grant of representation.

Held, that (1.) the plaintiff's application was not invalid by reason of the originating summons having been taken out prior to the date of probate : inasmuch as the application was made before November 6, 1947, it was made within the period of six months required by s. 2, sub-s. 1, of the Act. At the hearing it was too late to object to the application on the ground that it was irregular under the Rules of Court. (2.) Notwithstanding the testator's statement in the will, the court had discretion under s. 1, sub-s. 7, of the Act to admit evidence showing that the testator had other reasons than those stated in the will for not making provision for the plaintiff.

ADJOURNED SUMMONS.

This was an application under the Inheritance (Family Provision) Act, 1938, whereby the testator's widow asked for maintenance out of the testator's estate.

The testator, George Percy Baggott Searle, who died on October 29, 1946, by his will disposed of his property but did not make provision for his wife ; he stated in the will a reason why he omitted to do so. On March 18, 1947, his widow took out a summons under the Act and made the executors and two beneficiaries defendants thereto. At that time no representation had been taken out. Probate was first granted to the executors on May 6, 1947.

The court was asked to determine two preliminary questions. First, on behalf of the defendants it was contended that the application was a nullity because it was made before the commencement of the period of six months within which an

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law]

application had to be made, according to s. 2, sub-s. 1 (1), of the Act. Secondly, it was submitted on behalf of the plaintiff that in view of the provisions of s. 1, sub-s. 7 the defendants were not entitled to adduce evidence showing that the testator might have had other reasons than those stated by him in his will for not making provision for the plaintiff, but that the plaintiff was entitled to prove that the reason given in the will was unfounded.

The case is reported on these two preliminary questions only.

B. S. Tatham for the first two defendants, the executors.

Raymond Jennings K.C. and *M. J. Albery* for the other two defendants, beneficiaries, on the defendants' preliminary point: The summons, was taken out before probate was granted, and the application thereby made was premature. Since no application was made between May 6, 1947 and November 6, 1947, the court has no jurisdiction. *In re Bidie, decd. Bidie* v. *General Accident Fire and Life Assurance Corporation* (2) shows that sub-s. 1 of s. 2 has to be construed strictly.

Montgomery White K.C. and *H. S. Ruttle* in reply. In point of time the summons is in order. The executors derive their authority from the will, not from the grant of probate which only completes their title; the Act does not provide that they cannot be made defendants before the grant of probate. Further, the defendants should have objected to the alleged irregularity of the summons earlier; it is now too late to object. [Counsel referred to R. S. C. Or. 70, r. 2 (3).]

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(1) Inheritance (Family Provision) Act, 1938, s. 2, sub-s. 1: ". . . . an order under this Act "shall not be made save on an "application made within six "months from the date on which "representation in regard to the "testator's estate for general pur-"poses is first taken out."

Sub-s. 7: ". . . . . have regard to "the testator's reasons, so far "as ascertainable, for making the "dispositions made in his will, or "for not making any provision "or any further provision, as the "case may be, for a dependant, "and the court may accept such "evidence of these reasons as it "considers sufficient, including "any statement in writing signed "by the testator and dated, so, "however, that in estimating the "weight, if any, to be attached "to any such statement the court "shall have regard to all circum-"stances from which any inference "can reasonably be drawn as to "the accuracy or otherwise of the "statement."

(2) [1948] Ch. 697; since reversed by C. A. [1948] W. N. 454.

(3) R. S. C. Or. 70, r. 2: "No "application to set aside any pro-"ceedings for irregularity shall be "allowed unless made within a "reasonable time, nor if the party "applying has taken any fresh "step after knowledge of the "irregularity."

ROXBURGH J. The first preliminary objection is taken by the defendant beneficiaries and raises a short but somewhat important point. Section 2 of the Inheritance (Family Provision) Act, 1938 enacts: " Except as provided by s. 4 of this " Act an Order under this Act shall not be made save on an " application made within six months from the date on which " representation in regard to the testator's estate for general " purposes is first taken out." Section 4 is, for the present purposes, immaterial and I do not think any other section of the Act is relevant, but Or. 54F, rr. 1 and 2 are material: " An " application to the High Court under s. 1 of the Inheritance " (Family Provision) Act, 1938 (in this Order called the Act) " shall be made in the Chancery Division by originating " summons inter partes and shall be intituled In the matter of " the estate of the deceased to which the summons relates and " in the matter of the Act." " 2 (1.) On an application under " s. 1 of the Act the person applying shall be plaintiff and the " executor or other personal representative of the testator's " estate shall be defendant." The facts in the present case are these. The testator died on October 29, 1946; the summons was taken out on March 18, 1947; no representation was granted until May 6, 1947; accordingly the summons was taken out before Probate. Was the application good within s. 2, sub-s. 1 of the Act?

This question of construction is not easy but I propose to guide myself by two considerations.

It is submitted by counsel, who has very properly drawn my attention to the point, that for the purposes of s. 2 time begins to run from the date of the grant of representation and, therefore, any application made before the grant must necessarily be made before the commencement of the period of time within which application may be made and so be a nullity. If that construction be correct, as far more than six months have now elapsed since the date of the grant, this blunder, if it be a blunder—and as to that I shall have more to say later—would result in depriving the plaintiff of any possibility of getting what, apart from the blunder, she might have got—and what she will get I do not know because I have not tried the case. That any blunder of that sort should completely and finally deprive a litigant of recourse to the court would, I think, challenge the foundations of natural justice. That is one principle by which I propose to guide myself. The other is that the obvious purpose of this section is to prevent applications from being made too late, when parties have altered their position by treating the dispositions made by the testator as effective. It seems to me improbable that Parliament ever thought of applications which might be made too soon.

Bearing those considerations in mind, I propose to construe this section in the following way. It is to be noted, first, that the section directs the attention of the court not to the application but to the order and it provides: "An order shall "not be made save on an application made within six months "from the date on which representation .... is first taken out." The time to look at the matter, it seems to me, is the time when the court is about to make an order, and the court must then see what is the application upon which the order is sought. For that purpose the court looks at the date on which representation was first taken out, in this case May 6, 1947; it then adds six months to that which brings it to November 6, 1947, then it says "was the application made before "November 6, 1947?" and if the answer is "Yes" then, in my judgment the application was made within six months from the date on which representation in regard to the testator's estate for general purposes was first taken out. I am not sure that I should have been able so to construe these words but for the two important considerations to which I have referred. I think, however, that those responsible for drafting the rules applicable to this matter may have had some inkling of what might happen, because r. 2 provides that the executor or other personal representative shall be the defendant and that the matter should be intituled in the matter of the estate of the deceased. I think that the draftsmen of these rules must have been thinking of the time when the application could first be made but the rules do not make the position clear.

Mr. Montgomery White has strenuously argued that it is permissible under these rules to start an application before probate, provided you can find out the names of the executors named in the will, and quite irrespective of whether they ultimately prove the will or not. I am not proposing to decide as a matter of construction whether such a course is permissible under the rules because it appears to me that if and so far as the only irregularity is under the rules, it is too late to take the point. It is a point of no substance on the merits because, in fact, the very persons who were named as defendants and are described as the persons who claim to be the executors of the will, did, in fact, become the executors, and as it is now too late, in my judgment, for the point to be taken I am absolved from the necessity of deciding it. I wish to say nothing to encourage the idea that applications of this character should be made before the grant of representation, though if somebody is bold enough to try the experiment again and objection is taken in due time, it would be for the court, which has to hear the objection, to decide whether or not the applicant was out of time. Accordingly I dismiss the preliminary point.

The next point which I have to determine is what evidence is admissible as a matter of law under s. 1, sub-s. 7, of the Act, and I think it is necessary to determine that point before reading the evidence in this case, because the proposition is framed as a proposition of law.

[His Lordship read the sub-section and proceeded :] In this will the testator has made a statement of his reasons. For the purpose of this point it is immaterial to read that statement and as this case is one of some general interest I do not want to encumber it with matters of a personal nature. Mr. Montgomery White's proposition of law is that as the testator has made a statement of his reasons in his will, no other evidence can be given as to the reasons that the testator had for not making any provision for his wife, as in fact he did not. First of all, Mr. Montgomery White bases his submission upon the construction of the statute, but it appears to me that every line of the statute indicates the opposite conclusion. The direction to the court is couched in the widest possible language. The court is directed " to have regard to the testator's reasons " so far as is ascertainable." That would not lead one to expect that the Act meant " so far as is stated in his will if so " stated." Then it goes on : " and the court may accept such " evidence of those reasons as it considers sufficient." That is an invitation to the court to do something which, if Mr. Montgomery White's contention is correct, a court has, none the less, no jurisdiction to do. And then it continues : " including " any statement in writing signed by the testator and dated." I suppose some wills are not dated although they usually are, and if there was any such presumption as Mr. Montgomery White has suggested it is strange to find that phrase which, while it includes a will, includes innumerable other forms of statements. It appears to me that that is giving the court powers either to accept or reject in the exercise of its discretion any statement contained in, amongst other things, the will.

ROXBURGH J.

1948

SEARLE, DECD., *In re.* SEARLE *v.* SIEMS.

Then the sub-section goes on to say: "that in estimating the "weight, if any, to be attached to any such statement"—that seems to me to include a will—"the court shall have regard to "all the circumstances from which any inference can reasonably "be drawn as to the accuracy or otherwise of the statement." Mr. Montgomery White also based his submission upon the doctrine of estoppel, his submission being that the defendants who claim through the testator are, as a proposition of law, estopped by statements in the will. But Mr. Montgomery White cited no authority in support of this as a principle for the construction of a statute or in any context comparable with that with which I am now dealing, and I decline to hold that the discretion which, in my judgment, is conferred upon the court expressly by sub-s. 7 of s. 1, is to be curtailed by the application of any such principle of estoppel.

Both preliminary objections overruled.

Solicitors for the plaintiff: *Goodman, Brown & Warren, for Derrick Bridges & Co., Barnet.*

Solicitors for the defendants: *Haslewood, Hare & Co., for Bosley & Co., Brighton.*

JENKINS J.

1948

Nov. 3, 4.

In re ROSE.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY LIMITED *v.* ROSE.

Will — Construction — Bequest of shares in private companies — Specific or general—Total holdings bequeathed—Gift of shares "if "such shares have not been transferred to him previously to my "death"—Shares not registered at testator's death—Ademption.

By cl. 3 (*a*) and (*b*) of his will dated December 6, 1943, a testator bequeathed to Margaret R. and Michael R. each "500 preference "shares" and "500 ordinary shares" in E. P. R., Ld., a private company. The testator, who died in January, 1946, had in October, 1945, sold his ordinary shares in E. P. R., Ld. to D., Ld.,

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

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to which company he at the same time gave an option which D., Ld. exercised in January, 1947, of buying his preference shares.

By cl. 3 (*g*) he gave to H. " 8,300 ordinary shares " and " 5,000 " preference shares " in S., Ld., a private company, " if such " preference shares have not been transferred to him previously " to my death." The transfer of the preference shares to H. was executed by the testator in August 1944, but not registered by the company till March, 1946.

By cl. 3 (*h*) he gave to W. J. " 2,189 ordinary shares, 4,000 " preference shares and 6,000*l.* debentures " in S. Ld.

By cl. 4 he gave the residue of his " real and personal " property to W. J.

The gifts in cl. 3 (*a*) and (*b*) and in cl. 3 (*g*) and (*h*) amounted to the testator's total holdings in E. P. R.. Ld. and S., Ld., respectively.

By this summons it was asked whether (i.) the legacies were specific or general, (ii.) the gifts of shares in E. P. R., Ld., if specific, were adeemed by the sale to D., Ld., (iii.) the gift to H. of 5,000 preference shares took effect under the will.

Held (1.) that by cl. 3 (*g*) and (*h*) the testator had made specific gifts without using the possessive pronoun; these gifts, as well as those in cl. 3 (*a*) and (*b*), exhausted his total holdings in two private companies with restrictions on the transfer of their shares; and these indications, taken together, established that all the legacies were specific.

In re O'Connor [1948] Ch. 628 considered and distinguished.

(2.) that the gifts of preference shares in E. P. R., Ld. were adeemed by the sale to D., Ld.

In re Carrington [1932] 1 Ch. 1 followed.

(3.) that the testator had done everything in his power to divest himself of the preference shares in favour of H. Completion of the legal title by registration could only be the act of a third party, and the testator had not intended the efficacy of his proviso to depend on whether completion took place before or after his death. Those shares passed by gift inter vivos. *Milroy* v. *Lord* (1862) 4 De G. F. & J. 264 and *In re Fry* [1946] Ch. 312 distinguished.

ADJOURNED SUMMONS.

By cl. 2 (*a*) of his will dated December 6, 1943, Edward Barkley Rose, having appointed the plaintiff company to be his executors, gave the following direction " I desire the " company to consult . . . . my accountant . . . . as to the " best method of realizing my shares in H. G. Sanders and Son, " Ld." By cl. 3 (*a*) and (*b*) he gave to his niece Margaret Rose and his nephew Michael Rose each " 500 preference " shares " and " 500 ordinary shares " in E. P. Rose and Son, Ld., a private company. In cl. 3 (*g*) a bequest to Ernest Hook of " 8,300 ordinary shares " in H. G. Sanders and Son, Ld., a private company, was followed by the words "and I also give "him 5,000 preference shares in H. G. Sanders & Son, Ld. "if such preference shares have not been transferred to him "previously to my death." By cl. 3 (*h*) he bequeathed to Winifred Jameson "2,189 ordinary shares, 5,000 preference "shares and 6,000*l.* debentures in H. G. Sanders and Son, Ld." By cl. 4 he gave the residue of his property "both real and "personal" to Winifred Jameson. The shares given under cl. 3 (*a*) and (*b*) and under cl. 3 (*g*) and (*h*) were the testator's total holdings in E. P. Rose & Son, Ld. and H. G. Sanders and Son, Ld. respectively.

The testator died in January, 1946. In 1945 he had agreed to sell his shares in E. P. Rose, Ld. to Debenhams, Ld. and sold them the ordinary shares in October, 1945. Under the same agreement Debenhams bought the preference shares in January, 1947.

In August, 1944 the testator executed a voluntary transfer of 5,000 preference shares in H. G. Sanders and Son, Ld. to Hook, and delivered to him the certificates. The directors of the company, however, in the exercise of their powers refused at first to register the transfer but did so in March, 1946, so that the testator was the registered holder of the shares at his death. The executors took out a summons to determine whether (*a*) the legacies were specific or general; (*b*) the gift of shares in E. P. Rose and Son, Ld., if specific, were adeemed by the sale to Debenhams, Ld., (*c*) the gift to Hook of 5,000 preference shares in H. G. Sanders and Son, Ld. took effect under the will.

R. J. S. Thompson for the executor company, plaintiffs.

F. G. King for the defendant Margaret Rose. It is a general legacy. The possessive pronoun is not used, as it was in *In re Gage* (1), in which the testator also held the precise amount which he bequeathed. If the gifts of shares in Sanders and Son, Ld. are held to be specific, it is not necessary to imply that the shares in E. P. Rose and Son, Ld. were specifically given: see *MacDonald* v. *Irvine* (2). In *In re O'Connor* (3) the gift of the shares was held to be a general legacy although they were in a private company with restrictions on transfer. The legatee should have a general legacy equal to the value of the shares at the testator's death.

(1) [1934] 1 Ch. 536.
(2) (1878) 8 Ch. D. 101.
(3) [1948] Ch. 628.

Tonge for the defendant Michael Rose, adopted the argument of F. G. King. The amount corresponds exactly with the testator's holdings, but in *Robinson* v. *Addison* (1) there was a similar correspondence, and the shares were not purchasable in the open market, yet it was held a general legacy. In *In re Willcocks* (2) the testator used the words "the remainder of "my real and personal estate," and did not include the shares in his residuary gift. He referred to Theobald on Wills, 10th ed., p. 114, and to *In re O'Connor* (3), where the judge had *Robinson* v. *Addison* (1) before him.

Sir Andrew Clark K.C. and *Guest Mathews*, for the defendant Ernest Hook. The legacies are specific. It is a question of construction as to what is enough to displace the prima facie presumption that a gift of stocks or shares is general. The mere fact that the shares given are the exact number held is not by itself enough, but it is an important factor. *Robinson* v. *Addison* (1) does not cover this case because it does not deal with restrictions on transfer. It is only authority for saying that where there was "no current price" and the shares were "not commonly brought into market" the legacy was general. But here the shares are in a private company with restrictions on transfer. The share capital of E. P. Rose and Son, Ld. had been acquired by Debenhams, Ld., who were unlikely to sell, and it could only be obtained by a purchase of the controlling interest. If the executors could not buy the shares it was a strong indication that they were specifically given. *Robinson* v. *Addison* (1) can be distinguished; see Jarman on Wills, 7th ed., vol. 2, p. 1042, last paragraph. The gifts of shares in H. G. Sanders and Son, Ld. must have been specific, and where some gifts are specific there is a presumption that all are: see *In re Nottage* (4), by which this case is governed, and *In re Platt* (5). The will as a whole showed that the testator intended to give his own shares in private companies, not that his executors should buy shares.

Alcock for the defendant Winifred Rose (formerly Winifred Jameson) adopted the argument of Sir Andrew Clark K.C. The testator is thinking in terms of shares which he has, therefore in terms of a specific legacy. There are here not less than six indications that the testator intended a specific legacy. In *In re O'Connor* (3) there were only two.

(1) (1840) 2 Beav. 515.
(2) [1921] 2 Ch. 327.
(3) [1948] Ch. 628.
(4) [1895] 2 Ch. 657.
(5) [1894] 1 Ch. 491.

Guest Mathews for the defendant Ernest Hook, on the question of the effect of the transfer. It was a good transfer to Hook. He had the beneficial interest at the testator's death, and he became the legal owner as well. The shares have not been included in the probate. It was a good gift of the whole beneficial interest, notwithstanding the company's delay in registering. The testator had done all he could to pass the property and had delivered the certificates.

Alcock in reply. The gift to Hook was inchoate, and therefore insufficient to pass the shares absolutely. Owing to the restrictions on the transfer of shares in private companies no one could say the shares would be registered until they in fact were registered. The company had power to refuse to register, and at first did so refuse. If the shares were not transferred at the time of the testator's death the gift took effect at death and passed under the will. Not only must the transfer be executed but the property must vest in the donee; otherwise the gift was inchoate. He referred to *Milroy* v. *Lord* (1) and to *In re Fry* (2).

JENKINS J. The first question which I have to decide in this case is whether certain gifts of shares made by the testator are specific gifts or are in the nature of general legacies.

I turn to the consideration of the question which is primarily one of the construction of the will, though the numerous authorities bearing upon this subject provide guidance as to the rules or principles of construction to be followed in its solution. One starts with the general proposition that the court leans against specific legacies, and is inclined, if it can, to construe a legacy as general rather than specific; so that if there is any doubt it should, on the whole, be resolved in favour of the view that the legacy is general. There are certain other principles to be extracted from the authorities, to which I propose now briefly to refer.

The earliest case in order of date to which I will refer is *Robinson* v. *Addison* (3). In that case the testator made a gift of fifteen and a half shares in the Leeds and Liverpool Canal. It was held that that gift was general and not specific, even though the testator referred to the exact number of shares which he held, and even though they were shares which were not readily marketable. Those two points were dealt with by

(1) (1862) 4 De G. F. & J. 264.

(2) [1946] Ch. 312.

(3) 2 Beav. 515.

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the Master of the Rolls, and the conclusion to which he came was that those two circumstances were not enough to make the gift specific (1). Then there is *MacDonald* v. *Irvine* (2). It was held in that case that a legacy of 500 Egyptian 9 per cent. bonds was not specific, though the testator had such bonds at the time, and the will contained other gifts of bonds of the same description in terms which made them clearly specific gifts.

The next case to which I can most conveniently refer is *In re Willcocks, Warwick* v. *Willcocks* (3). The effect of that decision appears from the headnote: "The bequest of a sum "of stock in pounds, shillings and pence, being the exact "amount of the stock the testator possesses at the date of "his will, is a general legacy unless there is something else on "the face of the will to indicate that the testator intended it to "be specific." P. O. Lawrence J. dealt on p. 329 of the report with the question of the gift being in pounds, shillings and pence as opposed to being in round numbers, and on p. 330 he dealt with an additional point, namely, the effect of the residuary gift being in the form "the remainder of my real and "personal estate." He held that it would be attaching too much importance to the words of the residuary gift to hold that they had the effect of making the legacies which preceded it specific. Then I was referred to the case of *In re Gage* (4), a decision of Clauson J. in the case of a gift of 1,150*l.* 5 per cent. war loan. The question about it arose owing to the conversion of the loan of that particular issue. Clauson J. held that "It is clear that notwithstanding that the testator "at the time he made his will did in fact hold that precise "amount of the war loan described in his will, I am bound, "in the absence of the possessive pronoun or of some other "context indicating that the stock which he intended to give "by his will was the very stock of which he was then the "holder, to hold that bequest to be a general bequest and not "a specific bequest." Next I should mention the most recent case on this subject, which is the case of *In re O'Connor* (5). The gift under consideration in that case was a bequest to the testator's son of 10,000 preference shares of 1*l.* each fully paid in a named company. The company was a private company in which the testator at his death held only 9,000 preference shares as compared with the 10,000 he purported to give by his will.

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(1) 2 Beav. 515, 519, 520.
(2) 8 Ch. D. 101.
(3) [1921] 2 Ch. 327.
(4) [1934] 1 Ch. 536.
(5) [1948] Ch. 628.

The will included a residuary gift to trustees on trust for sale with a direction for payment of "the pecuniary legacies "hereinbefore bequeathed." Roxburgh J. said (1): "There "are two points in favour of either view. In favour of a general "legacy is the fact that there is nothing in the language of cl. 5 "itself to indicate that the testator is describing specific "property of his. For example, the testator does not use the "word 'my' or any possessive word. The second point in "favour of a general legacy—and, in my judgment, a very "strong point—is that the testator never had ten thousand "preference shares either at the date of his will or at the date "of his death, but only nine thousand, and accordingly, if he "did intend by this clause to make a specific disposition of "existing property of his, he must have been misinformed as "to its extent. Those are the two points in favour of a general "legacy. The two points in favour of a specific legacy are "these: First, there is the circumstance that the bequest "is one of shares of a private company of which the testator "was the manager and governing director, and a company "in which the shares were subject to the restrictions on "transfer usual in such a case. Secondly—and this is a very "important point—the testator did not include the bequest "of the preference shares among the bequests which his "executors and trustees were to satisfy out of residue . . . . "What then ought I, in the circumstances, to hold? There is "no doubt that the court leans strongly in favour of a general "legacy. How strongly is apparent from the decision in "*In re Willcocks* (2), yet if the testator, instead of referring to "ten thousand preference shares had referred to nine thousand "or less preference shares I should have held that there was "sufficient context here to carry me to the other side of the "line." In the result the learned judge, taking into consideration all the points bearing either way, came to the conclusion that the legacy in that case was a general legacy. Although that was the result in the particular case, it is important to observe the reference by the learned judge to the character of the company and to the number of shares given as compared with the number held by the testator at the date of his will. He indicates that if the testator had referred to the exact number he would have thought that there was sufficient context to carry him to the other side of the line. That, of course, must be read in the light of the fact that the will before

(1) [1948] Ch. 628, 631, 632.

(2) [1921] 2 Ch. 327.

the learned judge in that case did contain an indication not present here in the special form of residuary bequest. Those were the cases cited to me on behalf of the parties concerned to show that the legacies in this will are general legacies.

On the other side, I was referred by Sir Andrew Clark to *In re Pratt* (1), a case in which a legacy of 800*l.* "invested "in" 2½ per cent. consols in a will where the context had some bearing on the point was held to be specific and not demonstrative. The judgment of North J. in that case shows that the question was one in answering which regard must be had to the particular will as a whole, the question being, like any other question of construction of a will, a matter of arriving at the testator's intention from the language he has used in the context in which he uses it. Finally, I was referred by Sir Andrew Clark to *In re Nottage* (2). In that case the circumstance that certain gifts of investments were clearly intended to be specific was held to afford a sufficient indication, in conjunction, of course, with the other features of the will, that other associated gifts, if I may so describe them, of investments, in words which, if they had stood alone, might have been consistent with their being general legacies, made gifts of that doubtful character specific. I think, for the present purposes, I can content myself with reading this passage from the end of the judgment of Rigby L.J. (3): "But when a man has "different kinds of investments, and by his will deals with them "all, dealing with some of them in such a way as to make it "absolutely clear that he intended specific gifts, and with "regard to all there are expressions in the will which agree "better with the hypothesis that the gifts are specific than "that they are general, I think we may safely conclude that "the gifts of investments of particular descriptions are "specific."

Those are the authorities and, having referred to them, I return to the will. In sub-cl. 2 of para. 2 the desire is expressed that the Midland Bank Executor and Trustee Company Limited should consult the testator's accountant "as to the best method "of realizing my shares in H. G. Sanders and Son, Ld." That carries one this far, that, at any rate, so far as H. G. Sanders and Son, Ld. are concerned, the testator is making his will with reference to the fact that he is at the date of the will a holder of shares in that company. Then in cl. 3 come the

(1) [1894] 1 Ch. 493.
(2) [1895] 2 Ch. 657.
(3) Ibid. 665.

words of gift which govern all the bequests which follow: "I give and bequeath the following legacies all free of estate "duty and all other death duties." The first two gifts are (*a*) and (*b*), the gift to Margaret Rose of 500 preference shares and 500 ordinary shares in H. P. Rose and Son, Ld., and to Michael Rose 500 preference and 500 ordinary shares in the same company. So far, having looked at the surrounding circumstances, one finds that by those two gifts, (*a*) and (*b*), the testator is in fact disposing of the exact total numbers of preference and ordinary shares in the company in question which he held at the date of his will. Coupled with the fact that the company was a private company, that exactly produces the situation which Roxburgh J. thought would have been sufficient in the case of *In re O'Connor* (1) to take the gift to the other side of the line. But one has not here the significant residuary gift in the particular form which was present in *In re O'Connor* (1), and so far, therefore, it is doubtful, in my judgment, whether there is enough in this case to put the gifts in question over the line, though they are very near the line.

After the series of pecuniary legacies in sub-cll. (*c*) to (*f*), comes the gift of the shares in H. G. Sanders and Son, Ld.: "To Ernest E. Hook . . . . 8,300 ordinary shares in H. G. "Sanders and Son Ld. and I also give him 5,000 preference "shares in H. G. Sanders and Son, Ld. if such preference shares "have not been transferred to him previously to my death. "(*h*) To Miss Winifred Jameson . . . . 2,189 ordinary shares, "5,000 preference shares and 6,000*l.* debentures in H. G. "Sanders and Son, Ld." When one comes to that gift one is struck at once by this, that just as in the case of the preference and ordinary shares in E. P. Rose and Son, Ld., the testator has disposed of the exact numbers or amounts of preference and ordinary shares and debentures possessed by him at the date of the will in H. G. Sanders and Son, Ld. He has divided them up exactly between the two beneficiaries so as to exhaust the total. I think that becomes more significant when one sees such numbers as 8,300 ordinary shares to Mr. Hook and 2,189 ordinary shares, making the exact total holding of 10,489 ordinary shares to Miss Winifred Jameson (who is now the defendant Mrs. Winifred Rose).

But the matter does not rest there because the language of sub-cl. (*g*) of cl. 3 is such as to make it plain on the face of the will that the testator's gift of preference shares to Mr. Hook

(1) [1948] Ch. 628.

can only be a specific gift: I give to "Ernest E. Hook 8,300 "ordinary shares in H. G. Sanders and Son, Ld. and I also give "him 5,000 preference shares in H. G. Sanders and Son, Ld. "if such preference shares have not been transferred to him "previously to my death." That gift of preference shares to Mr. Hook must obviously be intended by the testator to be a specific gift, but he makes it in the form "I also give him "5,000 preference shares"—he does not introduce the possessive pronoun, although clearly meaning the gift to be specific. I think it follows from that, that the gift of 8,300 ordinary shares to the same legatee must also be specific and that when the testator goes on to make to Mrs. Winifred Rose the gift of 2,189 ordinary shares, 5,000 preference shares and 6,000*l.* debentures in H. G. Sanders and Son, Ld. he is in like manner disposing of specific property, the remainder of his holdings of shares and debentures in H. G. Sanders and Son, Ld., after providing for the specific gift of part of his holdings of preference and ordinary shares to Mr. Hook.

One then arrives at the conclusion on cll. 3 (*g*) and (*h*) that the testator is making what are clearly specific gifts without thinking it necessary to use the possessive pronoun, without thinking it necessary to say (for instance) "my 5,000 preference "shares." One is entitled, having collected that from sub-cll. (*g*) and (*h*) to go back and reconsider sub-cll. (*a*) and (*b*) where the gifts have so far been left trembling in the balance. If the testator had put "500 of my preference shares and 500 of "my ordinary shares," the case would have been clear beyond argument; he would, in so many words, have made those gifts specific. It is the absence of those words which gives rise to the whole difficulty. But having looked at cl. 3 as a whole, one finds that the testator does in fact in sub-cll. (*g*) and (*h*) make what must be specific gifts without the use of the possessive pronoun. One can therefore, in my judgment, discount its absence in sub-cll. (*a*) and (*b*) and, having regard to the other considerations to which I have referred, find that, notwithstanding the leaning of the court against specific legacies, there are sufficient indications in this will read as a whole in the light of the relevant circumstances to constrain the court to hold that here the testator was intending to dispose specifically of the shares he actually owned at the date of his will in E. P. Rose and Son, Ld. by dividing them in effect equally between his niece, Margaret and his nephew, Michael.

For these reasons, I propose to declare, in answer to question 1 of the summons, that the gifts in question were specific gifts.

It seems that I am bound on the authority of *In re Carrington* (1), and the long line of authorities there referred to, to hold that in this case there was ademption as to the gifts of preference shares in E. P. Rose and Son, Ld., which I have held to be specific gifts.

The next question arises on the gift to Mr. Ernest Hook of 5,000 preference shares in H. G. Sanders and Son, Ld. " if such " preference shares have not been transferred to him previously " to my death." The question I have to decide is whether on the facts those preference shares had been transferred to Mr. Hook previously to the testator's death within the meaning of that provision in the will. It appears that in the month of August, 1944, the testator handed a transfer to Mr. Hook executed by himself in Mr. Hook's favour of 5,000 preference shares in H. G. Sanders and Son, Ld. together with the relevant certificates. That was a voluntary transfer, but it is not disputed that it was intended by the testator to be a transfer by way of gift and not a transfer which, when perfected by registration, would give rise to a resulting trust. The company was a private company, and the right to claim registration of transfers was, therefore, subject to restrictions giving the directors a discretion in the matter. There is evidence from one of the directors of the company, Mr. Richardson, with respect, so far as is material for the present purpose, to the 5,000 preference shares to the effect that the directors, of whom he was one, decided that it was not in the interests of the company to register the transfer to Mr. Hook. He goes on to say : " After the death of the testator, seeing that the testator " had by his will bequeathed a considerable number of ordinary " and of preference shares in the company to the said Ernest " Edward Hook, the directors thought it right in fairness to " him to pass the two transfers " (that is to say, the transfer now in question, and a transfer of ordinary shares with which I am not for the moment concerned). " This " (says Mr. Richardson) " was accordingly done, and the said Mr. Hook " became registered as proprietor of," so far as is material, the preference shares in question.

It is argued on behalf of the residuary legatee that the testator's transfer of the 5,000 preference shares to Mr. Hook, owing to the fact that the transfer was not registered in his lifetime, was at the time of the testator's death in the state of being an incomplete or inchoate gift. I was referred on that to the well known case of *Milroy* v. *Lord* (1), and also to the recent case of *In re Fry* (2). Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is, of course, well settled that there is no equity to complete the imperfect gift. If any act remained to be done by the donor to complete the gift at the date of the donor's death the court will not compel his personal representatives to do that act and the gift remains incomplete and fails.

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(1) [1932] 1 Ch. 1.

In *Milroy* v. *Lord* (1) the imperfection was due to the fact that the wrong form of transfer was used for the purpose of transferring certain bank shares. The document was not the appropriate document to pass any interest in the property at all. In *In re Fry* (2) the flaw in the transaction, which was a transfer or transfers of shares in a certain company, was failure to obtain the consent of the Treasury which in the circumstances surrounding the transfers in question was necessary under the Defence (Finance Regulations) Act, 1939, and, as appears from the headnote, what was held was that the donor's executors ought not to execute confirmatory transfers. That is, of course, exactly in accordance with the principle that equity will not compel an imperfect gift to be completed. Something had to be done by the donor's executors if the gift was to be completed, and that was the execution of further transfers which were not open to the objection of the absence of Treasury consent. In this case, as I understand it, the testator had done everything in his power to divest himself of the shares in question to Mr. Hook. He had executed a transfer. It is not suggested that the transfer was not in accordance with the company's regulations. He had handed that transfer together with the certificates to Mr. Hook. There was nothing else the testator could do. It is true that Mr. Hook's legal title would not be perfected until the directors passed the transfer for registration, but that was not an act which the testator had to do, it was an act which depended on the discretion of the directors. Therefore it seems to me that the present case is not in pari materia with the two cases to which I have been referred. The real position, in my judgment, is

(1) 4 De G. F. & J. 264.

(2) [1946] Ch. 312.

JENKINS J.

1948

ROSE, *In re.*

MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* ROSE.

that the question here is one of construction of the will. The testator says "if such preference shares have not been transferred to him previously to my death." The position was that, so far as the testator was concerned, they had been so transferred. The testator had executed a proper transfer and had delivered it with the certificates to Mr. Hook. In my judgment, in that state of affairs the shares had been transferred to Mr. Hook previously to the testator's death within the meaning of that provision. It cannot, in my judgment, be held that by using those words the testator intended the efficacy of the provision to depend on whether the act of third parties, namely, the directors, necessary to complete the legal title in Mr. Hook by registration should have been performed before or after his death. That circumstance seems to me to be wholly irrelevant for the purposes of the provision in question.

What actually happened was that the transfer having been executed and the certificates handed over by the testator in his lifetime, Mr. Hook's title under the transfer was in fact completed by registration after the testator's death. In my judgment, therefore, the position is that the shares had been transferred to Mr. Hook previously to the testator's death within the meaning of sub-cl. (*g*) of cl. 3 of the will, and his title under the transfer to him was perfected after the death by registration, and he takes the shares comprised in the transfer by virtue of the transfer and not under the will. The consequence is, in my judgment, that the shares are taken by Mr. Hook under his inter vivos title and in satisfaction of the 5,000 preference shares I have already held to have been specifically given to him.

Declarations accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Vandercom, Stanton & Co.; J. A. Ramsey; Thorne, Owles & Neale.*

In re WALTER'S WILL'S TRUSTS.
STUART *v.* PITMAN.

JENKINS J.

1948

Nov. 4, 5.

Will—Gifts to legatees with trusts engrafted—Construction of engrafted trusts—Operation of accruer clause—Accruer to " the shares of the " daughters "—Personal survivorship not necessary for participation in accruer.

A testator by his will dated December 20, 1883, bequeathed a fund to trustees upon trust to divide it into as many shares as there should be daughters of his living at his death and to appropriate one such share to each such daughter, who was to have a life interest in the income thereof with power of appointment of the share to her children, for whom it was to be held in trust in default of appointment. On the failure of such trust the share of any daughter, subject to a surviving husband's life interest, was to accrue " to the shares of the daughters of mine if any " who should be unmarried at such daughter's death, and was to follow the destination of the share to which it should accrue. On the death of the last surviving unmarried daughter the shares, both original and accrued, were to be held in trust for the testator's three younger sons.

The testator died in 1888, leaving four sons and eight daughters him surviving. None of the daughters married except A. L. and A. G., who died in 1945 and 1947 respectively, both being widowed and childless, and having survived all the unmarried daughters. A summons was taken out by the trustee of the will to determine whether the shares of A. L. and A. G. now formed part of their estates, and, if not, how they were to be dealt with.

Held, that the accruer was expressed to be to the shares of the unmarried daughters, not to the daughters themselves. The shares, having been appropriated to each daughter, existed independently of survivorship, which was not necessary to enable the accruer to operate. Accordingly, the shares of A. L. and A. G. would accrue to the shares of the unmarried daughters and would thus pass to the estates of the younger sons, as the testator had contemplated.

ADJOURNED SUMMONS.

By his will dated December 20, 1883, William Walter conveyed a fund to trustees upon trust to make certain payments thereout and as to the rest " to divide the same or consider " the same to be divided " into as many equal parts as there should be daughters living at his death and " to appropriate or " consider and treat as appropriated " one such part to each such daughter and to hold the appropriated shares on trust to

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

give to each daughter a life interest in the income with power of appointment of the share to her children, for whom it was to be held in trust in default of appointment. There was a provision that, on the failure of such trusts the share of any daughter, subject to a surviving husband's life interest, was to "accrue to the shares of the daughters of mine if any" who should be unmarried at such daughter's death, and that it should follow the destination of the original share, which, with the accrued share, was, on the death of the last surviving unmarried daughter, "to go remain and be held on trust for my "said three sons their executors administrators and assigns "in equal shares as tenants in common." The residuary gift was in the following terms: "And as to the furniture goods and "chattels in my house in Stephen's Green, Dublin, and all the "rest residue and remainder of all my goods chattels and effects "whatsoever I bequeath the same to" [three named persons] "whom I hereby appoint as guardians . . . . to be applied "by them according to their discretion and as they may "consider most useful for the benefit of my said eight "daughters." In a codicil dated February 9, 1886, the testator directed that in certain events the share of his daughter Emily should "go to my other daughters in the same way as "their own shares as provided by my said will." In a second codicil dated September 28, 1887, he further directed that the sum of 110*l*. advanced to two of the daughters for their maintenance should be deducted from "such sum as may be "coming to each of them out of the bequests so made to them "by my said will." William Walter died a widower on December 15, 1888, leaving four sons and eight daughters him surviving. Six of the daughters died unmarried. The two married daughters, Mrs. Lipscomb and Mrs. Greeves, died in 1945 and 1947 respectively, both being widowed and childless and having been predeceased by all the unmarried daughters. A summons was taken out by the trustee of the will to determine whether the shares of Mrs. Lipscomb and Mrs. Greeves now formed part of their estate, or how they were to be dealt with.

Elverston for the plaintiff.

E. I. Golding for the first and second defendants, personal representatives of Mrs. Lipscomb. The gift over cannot operate because there are no more unmarried daughters left. The direction to divide the fund into as many parts as there were daughters living at the testator's death and to appropriate one share to each daughter constitutes an outright gift. The share was to be her property subject to express trusts. It is an absolute gift and the trusts engrafted on it have failed. *Hancock* v. *Watson* (1) applies. The testator intended unmarried daughters to have a life interest only. In *In re Payne* (2) there was an express direction against vesting. In *In re Marshall* (3) the word "appropriate" was not used. But in *In re Gatti's Settlement* (4) it was held that the word "appropriate" was apt to pass an absolute gift. Such an intention is confirmed by the language of the residuary gift, showing that it applies to the immediately realizable proceeds of his personal effects, not to his gilt-edged securities; and by the references in the first codicil to "their own shares" and in the second codicil to the deduction of sums advanced to two of the daughters from "the bequests made to them by my will."

Rink for the Public Trustee. There is an intestacy as regards the shares of both unmarried daughters, or at least as regards that of the last surviving one. There is no absolute gift or severance from the estate within *Hancock* v. *Watson* (1). The trusts of the shares are closely connected with the gift; *Rucker* v. *Scholefield* (5) applies, not *Lassence* v. *Tierney* (6). If the accruer were construed as following the shares of the unmarried daughters, whether living or dead, the result would be peculiar. The scheme of the will was that all the shares, other than those of married daughters who survived or had children, should ultimately pass to the survivor. The shares of the two married daughters therefore fall into residue, but there is an intestacy here also. The residuary gift covers only property in possession and is intended to be applied at once; it is a discretionary gift to be applied for the benefit of the daughters personally: see *In re White's Trusts* (7) and *In re Phene's Trusts* (8). But no daughter who could so benefit survived Mrs. Greeves. If, on construction, the discretion was for the benefit of all eight daughters, it was now impossible to exercise it. There was no discretion or trust, but an intestacy, in respect of the reversionary interest in the shares of the daughters who would necessarily be dead when such an interest became available.

(1) [1902] A. C. 14.
(2) [1927] 2 Ch. 1.
(3) [1928] 2 Ch. 661.
(4) (1936) 52 T. L. R. 674.
(5) (1862) 1 H. & M. 36
(6) (1849) 1 Mac. & G. 551.
(7) (1860) John. 656.
(8) (1868) L. R. 5 Eq. 396.

H. E. Francis for William Nelson Walter, claiming through the testator's sons. The rule in *Lassence* v. *Tierney* (1) has no application because the trusts affecting the shares in question have not been exhausted. The testator intended the daughter's shares to go to his younger sons if his daughters had no issue. The gift over of the shares of married daughters is a gift to the shares of daughters not married, whether living or dead. This gift over, upon its strict grammatical construction, operates here so as to carry the shares of Mrs. Greeves and Mrs. Lipscomb as an accruer to the shares of the deceased unmarried daughters. There is no ground in this case for departing from the strict grammatical construction.

If the trusts are held to have been exhausted there are here no words sufficient to pass to a daughter the absolute interest in any share. In construing the gift the vital words are "divide "or consider same to be divided" and "appropriate or "consider and treat same as appropriated." In *In re Hatch* (2) the word "appropriate" stood alone. The words "treat as "appropriated" are not dispositive but administrative; moreover they do not form an independent clause, but are coupled with the trusts, see *Rucker* v. *Scholefield* (3).

A. C. Nesbitt for personal representatives of Mrs. Greeves. The gift in the first place is absolute and the engrafted trusts do not exhaust the whole interest, because the language of the gift over plainly points only to daughters who were then living, and there were none. The decision in *In re Payne* (4) must be regarded as open to some doubt. See *In re Marshall* (5) and *In re Gatti's Settlement* (6). He referred to Jarman on Wills, 7th ed., vol. 2, pp. 1432, 1433.

JENKINS J. The first question I must endeavour to answer is: what has happened to Mrs. Amy Lipscomb's share on her death without issue on October 31, 1945? The competing views which have been argued before me are, first, that there was no trust applicable to her share in the events which have happened, with the result that under the rule in *Lassence* v. *Tierney* (1) there being, according to this argument, an initial absolute gift to her, her estate takes under the initial absolute gift which ex hypothesi has not been effectively cut down or taken away by the engrafted trusts. Another view is that not only is there no declared trust applicable in the events which have happened, but further there is no sufficient indication of an initial absolute gift in this will to make the rule in *Lassence* v. *Tierney* (1) applicable, with the result that the share passes under the residuary gift. A further view is to the same effect as to the failure of the declared trusts and the absence of anything amounting to an initial absolute gift, but adduces as a consequence that there must be an intestacy of the testator with reference to the share in question because it is said that what I have referred to as the residuary gift is not a true residuary gift, or, alternatively, in the events which happened, there was no one to take under it. Finally, it is said that the trusts declared of a daughter's share do, in the events which happened, exhaust the whole beneficial interest in Mrs. Lipscomb's share. It is said that if the ultimate trust as declared by the testator is properly construed, it will be found that, in the events which happened, Mrs. Lipscomb's share is carried over to the estate of the testator's three younger sons. Those are the questions with respect to Mrs. Lipscomb's share, and substantially the same questions arise with regard to Mrs. Greeve's share.

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(1) 1 Mac. & G. 551.
(2) [1948] Ch. 592.
(3) 1 H. & M. 36.
(4) [1927] 2 Ch. 1.
(5) [1928] 2 Ch. 661.
(6) 52 T. L. R. 674.

The difficulty in the case seems to have been occasioned by the distinction the testator made between his married and his unmarried daughters. It will be remembered that on the failure of the trusts in favour of the children or remoter issue of a daughter the share is to " go over and be added by way of " accruer to the shares of the daughters of mine if any who shall " at the time of the death of such daughter not have been " married with such consent as aforesaid and if more than " one," and so on. The effect of those words " who shall at the " time of the death of such daughter not have been married " with such consent as aforesaid " obviously excludes the share of any daughter who has married, so that Mrs. Lipscomb's share could not go over to the share of the one surviving daughter, Mrs. Greeves, because Mrs. Greeves being a daughter who had married with the requisite consent is excluded by definition from the accruer clause. In the ordinarily drawn will one would have expected, in default of issue, a simple accruer which would have ultimately carried the fund to the last survivor of the daughters. If, in the events which happened, there had in fact been an unmarried daughter surviving Mrs. Lipscomb, or, in the case of Mrs. Greeves, surviving Mrs. Greeves, it would not, I think, have been disputed by anyone but that the shares now in question would have gone over to the share of such surviving unmarried daughter, and on the subsequent death of the unmarried daughter her share, original and accruing, would have gone to the estate of the three sons. But, unfortunately, events were not so obliging, and, as I have already stated, at the respective deaths of these two married daughters all the unmarried daughters were already dead.

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(1) 1 Mac. & G. 551.

It has been argued that the accruer clause is, in those circumstances, incapable of being applied. It is said that it is limited in its operation to shares of daughters of the testator who shall, at the time of the death of the daughter whose share is being dealt with not only " not have been married with such " consent as aforesaid," but who shall furthermore be living at the time of the death of such daughter. It is said that by necessary implication personal survivorship is imported into this accruer clause as a condition of participating in the accruer. If that view is right, then, inasmuch as all the unmarried daughters were already dead, the accruer clause could not apply. The trusts declared by the testator would not, in the events which have happened, have exhausted the whole beneficial interest and the destination of the fund in each case, that is to say, of the share of each of these two daughters, would depend on the application or otherwise of the rule in *Lassence* v. *Tierney* (1), and failing its application, on the construction and effect of the so-called residuary gift, the question in the latter case being whether the shares passed under the residuary gift, or were not disposed of at all by the testator and passed as on an intestacy.

Now is there any real justification as a matter of construction for confining the accruer to shares of daughters living at the date of accruer who, in addition to being daughters, have not at that date " been married with such consent " ? In my judgment there is, as a matter of construction, really no justification for so limiting it. It should be noted that the accruer is expressed to be " to the shares of the daughters," not to the daughters. If the accruer had been expressed to be to the daughters as opposed to their shares that would have been, I think, a point in favour of the view that personal survivorship was required. But it is " to the shares of the daughters," and one must remember that by definition that means the shares appropriated, or to be treated as appropriated, under the preceding provisions of the testator's will to the daughters in question. The existence of those shares, it seems to me, does not depend at all on the survivorship of the daughters; nor does it seem to me that a daughter who has never married ceases to come within the definition of a daughter who shall not have "married with such consent as aforesaid" because she has died. On her death no doubt the possibility of her ever marrying with consent or otherwise comes to an end, but she still is quite properly described as a daughter who has not been "married with such consent as aforesaid."

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(1) 1 Mac. & G. 551.

I therefore find myself unable to read this accruer clause as operating only in favour of the shares of unmarried daughters who are living at the date of accruer. I suggested in the course of the argument by way of illustration the converse case. Supposing the accruer had been "to the shares of the daughters "of mine if any who shall at the time of the death of such "daughter have been married with such consent as aforesaid." It seems to me that that would clearly have included a daughter who had married with the requisite consent and who had died before the date of the accruer. To hold the contrary in that hypothetical case might very well have had the effect of depriving children of the deceased married daughter of any share in the accruer merely by the accidental event of the failure of their mother to survive. Grammatically I see no more reason for importing the condition of survivorship into the qualification "not have been married with such consent as "aforesaid" than there would have been in the converse qualification "have been married with such consent as "aforesaid."

I am fortified in the conclusion to which I have come by the consideration that, quite plainly, the testator contemplated that, subject to provision being made for his daughters and their children, if any, the fund should ultimately go to the three sons or their respective estates. One can imagine events in which that intention might have been defeated. He does not seem to have contemplated the possibility of all his daughters marrying and all or some of them having no children. He appears to have assumed that there would be some daughter or daughters of his who would be unmarried. With that qualification I think it is fair to say that he did contemplate that ultimately, subject to the provision he had made in favour of his daughters and their children, the estates of the three sons would take the

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corpus of the fund. The construction I have adopted accords, therefore, with what seems to have been clearly the scheme of the will. The contrary construction produces what, in my judgment, would be a capricious result, in that it would make the destination of the capital of the fund dependent on the accident of survivorship of at least one unmarried daughter of the testator at the date of the accruer. It seems to me that is a result which one should hesitate to produce unless the language of the will constrains one to do so.

For these reasons, the conclusion to which I have come, on the true construction of the will, is that on the respective deaths of Mrs. Lipscomb and Mrs. Greeves their shares, including accrued shares, if any, accrued in equal shares to the shares of the unmarried daughters of the testator, the share so accruing in each case being held upon the same trusts as and following the destination of such unmarried daughter's original share. The effect of such a declaration, I apprehend, will be, so far as the corpus of the fund is concerned, to carry it in equal shares to the estates of the three sons.

The conclusion to which I have come on this question of construction makes it unnecessary for me to express any view on the interesting questions which have been debated before me as to the application or otherwise of the rule in *Lassence* v. *Tierney* (1), in the event of the shares not being fully disposed of by the trusts, or the other interesting question as to the scope and effect of the residuary gift in this will which, it will be remembered, was somewhat curiously expressed as to its subject-matter and contained no gift to anyone except such gift as was to be implied from a discretion conferred on certain named persons to apply the residue "according to their discretion and as they may consider most "for the benefit of my said eight daughters hereinbefore "named." As neither of those interesting questions are material, in the view I have formed on the construction of the accruer clause in the will, I will not indulge in the expression of any superfluous views about them.

Solicitors: *Rowe & Maw, agents for Llewellyn & Hann, Cardiff, and for Carson, Baillie Johnston & Thom, Belfast; Radford, Frankland & Mercer, agents for Stanley Evans, Manchester.*

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(1) Mac. & G. 551.

In re GILLSON, DECD.
ELLIS *v.* LEADER.

C. A.
1948
Nov. 8, 9, 10.
Lord Greene M.R., Somervell and Evershed L.JJ.

Will—Bequest of "all my bloodstock"—Whether half share in a colt passes—Whether part interest in a stallion passes.

Costs of appeal—Several parties in the same interest represented—Only one set of costs to be allowed.

A testator by his will bequeathed "all my bloodstock" to his trainer. At his death he owned a stud of some eight thoroughbred horses. Included in the stud was a colt called Pink Flower in which he only owned a half share. A number of persons including the testator had joined in purchasing a stallion known as Colombo. The stallion was managed pursuant to an agreement by a syndicate, the testator at his death owned a fortieth interest in Colombo which entitled him to one free nomination a year for a mare to be served by this stallion. The testator's executors asked whether his interest in Pink Flower and Colombo passed under the bequest of "my bloodstock." Jenkins J. held that the word "bloodstock" must be construed in its natural meaning and did not include a part share or interest in a thoroughbred horse.

Held (varying the order of Jenkins J.), that the evidence showed that in the racing world in which the testator moved, the word "bloodstock" had a second primary meaning when used in connexion with the ownership of thoroughbred horses and included partly owned horses. The testator was familiar with that meaning and his interest in Pink Flower passed under the bequest of "bloodstock." The testator's interest in Colombo was more in the nature of an investment and did not pass under the bequest.

In re Sykes [1940] 4 All E. R. 10 distinguished.

On the appeal the four respondents, who were all interested in residue, were represented by three different counsel.

Per LORD GREENE M.R.: Where several parties in the same interest and with precisely the same arguments are before the court it is the duty of the solicitors concerned to avoid multiplication of costs. The practice in such a case is to allow such parties only one set of costs, certainly where the costs were to be charged on residue. Here the appellant had substantially succeeded and his costs as between solicitor and client should be paid out of the estate. The costs of the trustees, who were necessary parties, should also be so paid. For the other respondents there would be one set of costs only as between solicitor and client which would be paid out of the estate.

APPEAL from Jenkins J.

Godfrey Anthony Gillson, by his will, dated February 4, 1943, after appointing the plaintiffs to be executors and trustees thereof, provided by cl. 3: "I bequeath the following specific "legacies free of all death duties namely . . . . (*b*) To Lord

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"Willoughby de Broke such one of my foals or yearlings as he "shall within three calendar months from my death select and "I express the earnest request that he will have the same "trained by Mr. Harvey Leader of Denston Hall, Newmarket, "(*c*) to the said Harvey Leader all my bloodstock (except such "foal or yearling if any as shall be selected by Lord Willoughby "de Broke) with the request that he will make fitting gifts to "his employees and anyone else in the racing world with whom "I have been closely associated and who is deserving of such "gift but I declare that the foregoing expression of my wishes "shall not create any trust or legal obligation even if the same "shall be communicated to him in my lifetime."

The testator gave his residuary estate upon trust for the defendants Maurice Dugdale Gillson, Edith Christine Gillson and Rose Lawson for life with ultimate trusts for the defendant Judith Gillson. The testator died on March 3, 1944.

The testator when he died was the owner of seven or eight thoroughbred horses, and included in his stud was a bay colt called Pink Flower. The testator had acquired Pink Flower before he made his will and this colt had remained in his stud until his death. The legatee, Mr. Leader, the first defendant at all other material times down to the testator's death, was in charge of the thoroughbred horses in his stud. After the date of the will, the testator sold a half-share in Pink Flower to Mrs. Harvey Leader, the trainer's wife. She sub-sold an eighth part of her share to Mr. Harvey Leader and an eighth to a Major Keylock. On November 1, 1942, a stallion called Colombo was purchased by a number of persons, of whom the testator was one, from a Mr. Allnatt. On December 31st of that year an agreement was entered into by those purchasers and Mr. Allnatt, the vendor, who had retained an interest in the stallion. Under that agreement a committee was appointed who were in all matters arising out of and in connexion with the stallion and the enterprise provided for and contemplated by the agreement to act as a committee and agents for and on behalf of the subscribers. There were certain complicated provisions connected with nominations of mares to be served by this stallion in the first year of the agreement. The broad result of the agreement, when it got working, was that the parties to it obtained free nominations for mares to be served by this stallion according to the extent of the money which they had put up for the purchase price. There were forty shares or interests, and the testator had a fortieth share which entitled him, apart from the complications of the first year to one free nomination yearly. Some of the other parties to the syndicate had two, three or four and Mr. Allnatt had as many as ten shares. That was the general nature of the testator's interest in Colombo. This stallion was never included in the testator's stud.

Evidence was filed showing that in the racing world the word "bloodstock" when used in connexion with the ownership of thoroughbred horses included shares in partly owned horses. That evidence is set out in the judgment of Somervell L.J.

By this summons the testator's executors asked whether the interest of the testator in Colombo and Pink Flower passed under the bequest in cl. 3 (*c*) of the will to the defendant Harvey Leader. Jenkins J. held that the word "bloodstock" in its primary meaning meant thoroughbred horses and did not include a share in a horse. Accordingly, the interest of the testator in Pink Flower and Colombo did not pass under the bequest of "bloodstock." The defendant Harvey Leader appealed.

Charles Russell K.C. and *Sir Norman Touche* for the appellant Harvey Leader. The whole question turns on the meaning of "bloodstock" which Jenkins J. construed as describing thoroughbred and pedigree horses collectively as so many four-footed animals and therefore held that a share of a horse was not included in the testator's gift of "my bloodstock." There is no reason for so limiting the gift. "Bloodstock" is describing an attribute of property and the gift is equivalent to one of bloodstock property which would plainly include a share of a thoroughbred horse and not merely a series of complete chattels. A definition of bloodstock is only given in the supplement to the New Oxford Dictionary and it would be wrong to treat that definition as exhaustive. Three affidavits have been put in to show that "bloodstock," when used by people engaged in breeding horses, includes a share of a horse. It must be remembered that the testator was an owner of racehorses. *In re Rayner* (1), which relates to the meaning of the word "securities," contains a dictum by Vaughan Williams L.J. that a word must be construed in relation to the circumstances and occasion and date on which it is used. Here the inference is irresistible that bloodstock should be given the wider meaning appropriate to a definition of property and it must therefore include a share of a thoroughbred horse. In *In re*

(1) [1904] 1 Ch. 176, 188.

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Sykes (1) the gift was of " all my horses," and Bennett J. held that it referred to chattels consisting of animals with four legs and not to a share in a horse. That case is either distinguishable or wrongly decided. " My bloodstock " can more easily include shares in horses than " my horses." The expression " all my bloodstock " includes, when the words are given their ordinary and primary meaning, shares of bloodstock. The reference is to a whole branch of property. There is no distinction to be made between the two horses in question; although the testator owned a half-share of the one and one-fortieth of the other.

Geoffrey Cross for the respondents Edith Christine Gillson and Maurice Dugdale Gillson who were interested in residue. The stallion Colombo was owned by a syndicate under an agreement conferring rights and imposing liabilities on members of the syndicate. It is not as if the testator was in the position of an ordinary purchaser of a share in a horse. In that case the interest of the testator in Colombo cannot pass under the gift of my bloodstock. Such interest was not in the nature of ownership but was merely an investment. With regard to Pink Flower, the testator only owned a half-share in this colt. The decision of Bennett J. in *In re Sykes* (1) applies and the half-share in this colt does not pass. The primary meaning of " bloodstock " according to the Oxford English Dictionary is " thoroughbred or pedigree horses collectively." That definition does not cover shares in horses. There is nothing in this will to show that the word " bloodstock " is not used in its primary meaning.

G. C. D. S. Dunbar for the respondent, Rose Lawson, a residuary legatee adopted the same argument.

Blackett-Ord for the respondent, Judith Gillson, an infant interested in the capital of the residue. The question is as to the admissibility of extrinsic evidence to construe this will. Here the testator is referring to a class of goods. Extrinsic evidence is only admissible to show what property the testator owned which could pass under the bequest. Once it is shown that the testator owned a number of thoroughbred horses and the bequest cannot fail, evidence is not admissible of the surrounding circumstances to show what he meant. The testator must be taken to have used the word " bloodstock " in its primary dictionary meaning. He referred to *In re Hodgson* (2).

John Sparrow for the executors.

(1) [1940] 4 All E. R. 10. (2) [1936] Ch. 203.

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SOMERVELL L.J. There was evidence as to the meaning attached to the word "bloodstock" among those who own thoroughbred horses in what one might describe as the "racing world," to borrow the expression which is used in the clause in the will which we have to construe. Mr. McElligott, a member of the Royal College of Veterinary Surgeons, who has been for ten years a director of the British Bloodstock Agency, says this: "Part ownership of thoroughbred horses is extremely common. The word 'bloodstock' "in connexion with its owner is in my experience invariably "used and understood as including any share or shares he may "own in bloodstock horses, and the word 'bloodstock' by "itself as referring equally to a share or shares in a bloodstock "horse or horses as to a wholly owned bloodstock horse or "horses." Then he refers to an exhibit, an issue of "Sporting "Life," to which I may refer later. I need not read all the affidavits. I will read one more, which is quite short. Mr. Jarvis, a trainer of racehorses at Newmarket, says he has trained, owned and bred racehorses for upwards of thirty years. "In my life-long experience I have found that part ownership "of horses is extremely common and I have in fact been a "party to such partnerships and I say no one concerned in the "racing and breeding world in referring generally to the blood-"stock of an owner would intend to exclude from that phrase "his shares in partly owned horses and similarly a person who "only owned part interests in horses would be referred to as an "owner of bloodstock."

It will now be convenient to refer to counsel's note which we have of the learned judge's judgment. He says, and this of course is common ground, that the question turns upon the construction of certain clauses in this will before us. He then says that there is nothing to show that the testator was using the word "bloodstock" in any other but its ordinary primary meaning or that he was using it in an extended sense. He then quotes from the Oxford English Dictionary the definition of bloodstock as "thoroughbred or pedigree horses "collectively," and he proceeds on the basis that if you read that into the will—"all my thoroughbred horses"—it cannot include a horse in which the testator has only a share. He refers to a decision of Bennett J. in *In re Sykes* (1), in which Bennett J. was construing a bequest of "my horses." He decided that those words do not extend to or include the interest which a testator has as tenant in common of a horse. This case is different from that case in two respects: First of all, we have not got to construe "my horses," we have to construe the expression "all my bloodstock," and we have the evidence to which I have referred. It is no doubt right to say that words in wills normally have their primary meaning and that would normally be their proper construction, but with regard to this particular word "bloodstock" there is one thing worth noting, apart from the evidence to which I have referred. We were told, and this was not disputed, that it has only recently appeared in any dictionary, namely, in the supplement to the Oxford English Dictionary. Personally, that rather surprised me, as it seemed to me to be a word with which one was reasonably familiar. It has this relevance, I think, that it clearly is a word which has not had a long currency in ordinary usage and I think it is probably true to say that it is in the main used by those who are interested in thoroughbred horses. The court, of course, is in no sense bound by a dictionary. In normal cases the court is presumed to know the English language, though it is not unusual to look at dictionaries for assistance. I think myself that the conclusion from this evidence is, as the Master of the Rolls put it in the course of the argument, that among those interested in thoroughbred horses this word has a second primary meaning which, without it being possible to be completely precise, covers, or in many ordinary contexts is used as covering, a share in a horse as distinct from full 100 per cent. ownership. That the testator was familiar with that meaning is plain from what is known and what appears from the evidence as to his position as the owner of thoroughbred horses. I think it is also relevant to note that in the sub-clause which we have to construe the owner of thoroughbred horses was making a bequest to a trainer of thoroughbred horses, the appellant, Mr. Leader.

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(1) [1940] 4 All E. R. 10.

The case put forward was that both the testator's share in Pink Flower and his share in Colombo passed under the expression "all my bloodstock." I draw a distinction between the two. The facts in the case of Pink Flower, as I have stated, are that he parted with a share in this horse, retaining for himself a half-share. The horse remained as part of the testator's stud, trained by his trainer with his other horses. I think, having regard to the evidence, the expression "all my bloodstock" covers his share in Pink Flower having regard to those facts. I do not, however, think that the evidence goes as far as to make it right for the court to say that the expression "all my bloodstock" must be construed as including any share or interest whatever its nature that the testator has in any thoroughbred horse. With regard to Colombo, in the first place, though that might not in itself be conclusive, that horse was not with his horses at his stud, nor was it trained by his trainer. I am also influenced by the fact that under this agreement, though it was entered into after the purchase, we are, as it seems to me, dealing with rights different from those which arise in the ordinary simple case when two people each have, say, a half-share in a horse. The rights are of a somewhat complicated kind. The stallion is managed by a committee. The parties to what is called the syndicate contribute to the expenses and they each have the right of free nomination. It is much more in the nature of an investment. The right to nominate can be presumably bought and sold, and it is just worth noting that in the copy of the "Sporting Life," which was exhibited on another point, which I do not think it supported, under the heading "Bloodstock," there is this advertisement: "One share in Colombo syndicate "for sale," that is to say, it is described as a share in a syndicate rather than a share in a horse simpliciter.

Having regard to all those facts and, I hope, giving full and proper weight to the evidence, I cannot myself come to the conclusion that this share in Colombo is covered by the words which we have to construe, "all my bloodstock." For these reasons, I think the proper order to make here will be one under which Pink Flower passes under the bequest but the interest in Colombo does not.

EVERSHED L.J. I agree. The question for the decision of the court is the familiar one, what did the testator intend by the words he used in para. 3 (*c*) of his will, particularly the phrase "my bloodstock"? It is, I think, conceded on all hands that the court in construing the words is bound to pay regard to the circumstances as they existed at the death with a view to seeing upon what subject-matter the words could operate. It has been said that we ought not to pay regard to other evidence upon which Mr. Russell and Sir Norman Touche rely in regard to the use of the word "bloodstock" in those circles which have been referred to by Somervell L.J. as "the racing world." I do not think that is right. It seems to me that, for the reasons which my brother has fully canvassed, we are here entitled, if not bound, to take that evidence into account. Whatever one might suppose etymologically the word might mean, it is in fact only applied to horses, and in that connexion the word may well in many contexts be used and correctly used (that is to say so as to be understood) to include part shares in horses, it being remembered also that it is proved to be a common feature of "the racing world" that valuable pedigree or thoroughbred horses are owned in shares by more than one person. When all those facts are taken into account and the language used by the testator falls to be construed, it seems to me that there is here a proper distinction to be drawn between the case of Pink Flower and the case of Colombo. Jenkins J., I think, found that his mind revolted, so to speak, at the conception that this phrase was such as to cover both the interests in Pink Flower and in Colombo. The suggested interpretation of the words which Mr. Russell put was "all my property, bloodstock in quality." As I read the learned judge's judgment, he felt, if that was right, that it would cover all sorts of interests altogether too far removed from the sense of the language as he read it in para. 3 (*c*). If it was necessary to treat the words either as covering the testator's interests both in Pink Flower and Colombo or as covering neither, I should myself have followed the learned judge's view; but, as I have indicated, it seems to me that, on the facts of this case, there can and should be drawn a distinction between the two cases. It seems to me, putting it quite briefly, when one looks at the facts, the testator could properly be said as regards Pink Flower to be a racehorse owner and in the racing world, being a part owner of that horse, it would be proper to say, at any rate in some contexts, that his interest in the horse was comprised in the phrase "my bloodstock." And when the other facts to which Somervell L.J. referred are taken into account I conclude, for my part, that the phrase in this will was intended to cover and does cover his interest in that horse. But when one looks at the facts as regards Colombo, it seems to me that there the testator was really a participant in a commercial syndicate. True the subject-matter of the syndicate happened to be a racehorse, but that was relatively incidental. It seems to me, that without attempting to define the line between the two, one can say that in the one case the testator remained in truth the owner of a racehorse so as to bring it within the formula but in the other case he was really a participant in a commercial syndicate, and that kind of interest is not such as could properly be intended to be covered by the phrase "my bloodstock."

For these reasons I agree that a distinction should be drawn and to that extent I take the view that Mr. Russell is entitled to succeed.

LORD GREENE M.R. I shall not be thought disrespectful to the learned judge if I confine my remarks to one small point, because I am in entire agreement with what has been said by my brethren. The small point which I think is just worth mentioning relates to the case of Colombo. My brethren have said that the Colombo matter must be looked upon rather as an investment in a syndicate. I think some further weight is given to that view when the structure of the agreement is looked at and the nature of the syndicate, which is not, I think, without importance. Shares in the syndicate are forty in number. The highest number of services which the stallion is to give under the agreement is the usual number of forty. The agreement does not deal with any other kind of exploitation of the stallion save sharing out those forty nominations among the forty shares in the syndicate. Therefore, looking at the substance of the transaction, each person who put his money into this enterprise was getting out of it in effect not a share of a racehorse but a right to nominate, and nothing more. It is quite clear on the face of it that that is the substantial value of such an interest in such a syndicate. That appears to me to add force to the view that my brethren have taken as to the purely investment nature of that particular transaction. The result will be that the order of the learned judge must be varied by setting aside the order so far as it declared that the interest of the testator in the thoroughbred horse Pink Flower was not included and declare in lieu that it does include such interest.

I think it is right that I should repeat what has been said many times, that when appeals are brought to this court and there are several parties in precisely the same interest with precisely the same arguments who below may have been separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in this court. In the present case I can see no reason why, with a little goodwill and with a desire to avoid multiplication of costs, one set of costs only should not have been incurred. Parties with precisely the same argument come up to this court and three separate sets of costs are incurred. The practice,

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in my experience, always was in such a case to allow only one set of costs, certainly where costs are being charged on residue, for instance, or on a fund in which the persons interested are either absent or are infants and, therefore, are not in a position to consent. In the present case the appeal has succeeded substantially and we think that it is a proper case for the appellants' costs as between solicitor and client to be paid out of the estate. Similarly, the costs of the trustees, who are necessary parties in this court, should be paid as between solicitor and client out of the estate. For the other respondents there will be one set of costs only as between solicitor and client which likewise will be paid out of the estate. The way in which that one set of costs will be treated will, of course, be a matter for the taxing master in the usual way.

Order varied.

Solicitors: *Ward, Bowie & Co., for Rustons & Lloyd, Newmarket; Ellis, Peirs & Co.; May, May & Deacon; Lovell, White & King.*

B. A. B.

VAISEY J.
1948
Nov. 26.

In re GUARDIANSHIP OF INFANTS ACTS, 1886 and 1925, AND *In re* S. B. AN INFANT.

B. *v.* B.

Husband and wife—Maintenance of children—Maintenance order against husband in respect of child—Paternity disputed—Period of gestation —Evidence of maturity from hospital records—Guardianship of Infants Act, 1886 (49 & 50 *Vict., c.* 27), *s.* 5—*Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7.

Unless there is proof of prematurity, a period of 188 days is too short to be accepted in law as a period of gestation.

Maintenance orders under the Guardianship of Infants Act, 1886 and 1925, are made against persons qua parents and not qua spouses.

Accordingly, where a husband was ordered by a court of summary jurisdiction to pay a weekly sum towards the maintenance of a child alleged by the wife to have been born 188 days after conception, and evidence of the husband's non-access and of the child's maturity at birth were adduced aliunde,

Held, on appeal, (I.) that where the husband had not had access earlier than 188 days before the birth of a child to his wife, the

[Reported by L. L. LOEWE, Esq., Barrister-at-Law] presumption of legitimacy was displaced by conclusive evidence of the maturity of the child at birth.

(2.) that there was no jurisdiction to uphold a maintenance order under the Acts against the husband in respect of the child if the court was satisfied that he was not the father.

Clark v. *Clark* [1939] P. 228 distinguished.

APPEAL from Thames magistrate's court.

On March 1, 1948, at the Thames magistrate's court B. applied for and obtained a separation order against his wife on the ground of her adultery. The magistrate having ascertained the financial circumstances of the parties, neither of whom was represented, was concerned about the custody and maintenance of the child S. B. and allowed the wife to take out a summons under the Guardianship of Infants Acts, 1886, s. 5 and 1925, s. 7, and there and then made an order giving the custody of the child to the mother, granting the husband access and ordering him to pay 12*s.* 6*d.* weekly towards the child's maintenance. The order stated that it was made on complaint by the wife, who alleged that she was the mother and that the husband was the father of the child. B. subsequently took advice and applied to the magistrate on August 23, 1945, to have the order against him discharged on the ground that he was not the father of the child. The magistrate was doubtful about the admissibility of the evidence tendered before him and dismissed the application. The husband now appealed.

K. Bruce Campbell for the husband. The order should be discharged. If the wife's evidence is believed it gives a period of gestation of 188 days. That is too short. In *Clark* v. *Clark* (1) 174 days were held to be enough, but in that case there was abundant evidence of prematurity, and no evidence at all of infidelity on the part of the wife. Here the hospital records show maturity, and the husband had been granted a separation order on the ground of the wife's adultery.

The wife in person.

VAISEY J.: This is an unprecedented case. [Having stated the facts, his Lordship continued:] The admissibility of certain evidence given before the magistrate is doubtful, but I have now before me an affidavit from the officer in charge of records, Royal Engineers, stating that B., who was in the army at all material times, went abroad on military service on

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(1) [1939] P. 228.

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1948

GUARDIANSHIP OF INFANTS ACTS, 1886 AND 1925, *In re*, AND *In re* S. B. AN INFANT.

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October 14, 1943, and returned on January 29, 1945, and that there was no record of his having been granted leave to return to the United Kingdom on any earlier date, or that he had in fact so returned. It is admitted that intercourse took place on January 31, 1945, and that twins were born on August 8, 1945. That gave a period of gestation of 188 days. I also have as evidence the records of the hospital and ante-natal clinic, which showed that the wife attended there from March 9, 1945, when her period of pregnancy was estimated at twenty weeks. This would correspond with her last menstrual period, which was given as November 6, 1944. There is some slight doubt about these case-sheets, because some of the entries are in the handwriting of the medical officer who swore the affidavit, others in that of one of the hospital nursing staff. But there is nothing in them to show that the birth was anything but normal, or that the twins, who weighed 5 lb. 5 oz. and 5 lb. 8 oz., respectively, at birth were in any way premature. The wife gave no clear evidence of prematurity. I have been referred by Mr. Campbell to the case of *Clark* v. *Clark* (1), where the period of gestation was only 174 days, but the child was nevertheless held to be legitimate. In that case, however, the President said, at p. 230, "so far from this child being a fully developed nine "months' child, the experienced midwife who gave evidence ". . . . said that this and one other child were the two most "extreme cases of premature birth that she had seen in her "experience lasting well over thirty years." There is, as I have said, no such evidence of prematurity here, and it would be straining the facts to assume that the birth was the result of intercourse that took place only 188 days previously. I am therefore driven to the conclusion that the husband is not the father. But the Guardianship of Infants Act, 1886, s. 5, refers to fathers and mothers, not husbands and wives, and I therefore have no jurisdiction to uphold an order against the husband if I am satisfied that he was not the child's father. I therefore direct that the maintenance order against the husband, whereunder he pays 12*s.* 6*d.* weekly towards the maintenance of the child, be discharged. There will be no order as to costs.

Appeal allowed.
Order below discharged.

Solicitors for the appellant: *T. C. Halford & Co.*

(1) [1939] P. 228.

In re HAMBRO'S MARRIAGE SETTLEMENTS.

HAMBRO AND ANOTHER *v.* HAMBRO AND OTHERS.

ROXBURGH J.

1948

Nov. 9, 22.

Power—Defective execution—Power of appointment and revocation by deed—Power to be exercised by two persons jointly or by " the survivor " during his or her life "—Appointment by survivor by will inconsistent with joint appointment by deed—Implied revocation.

Where the result would be to divest interests which are vested in default of due reappointment, an appointment in a will is not equivalent to the exercise by the donee of a special power to revoke by deed during his life.

Where, therefore, a husband and wife by deed jointly appointed shares in a settled legacy to their children, reserving a power of revocation and reappointment by deed to themselves jointly or to the survivor of them "during his or her life," and the survivor by his will made an appointment inconsistent with the joint appointment by deed:—

Held that the appointment by will did not operate to revoke the appointment by deed.

ADJOURNED SUMMONS.

Two settlements made on July 16, 1894, in contemplation and in consideration of the marriage of Sir Charles Eric Hambro and Dame Sybil Emily Hambro (formerly Martin Smith), gave the husband and wife jointly a power of appointment by deed with or without power of revocation and new appointment in respect of a trust fund. In default of joint appointment the survivor had power to appoint by will, and in default of any appointment the fund was to be held in trust for their children. By deed dated February 11, 1936, the husband and wife jointly disposed of the whole fund by appointing various shares therein to each of their four children, the defendants Charles Jocelyn Hambro (afterwards Sir Charles), Richard Everard Hambro, Zelia Mary Osborne and Juliet Carin Hambro. The appointors thereby reserved to themselves power to revoke or vary the appointments made to all the children (except Charles Jocelyn Hambro), and this power was to be exercised by deed " during their joint lives " or by " the survivor during his or her life." Lady Hambro died in 1942 without having joined in exercising the power of revocation and Sir Charles Eric Hambro died in 1947, leaving four children him surviving. By his will dated September 9,

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

1943, he purported " in exercise of the powers conferred on me " by the two settlements " to appoint the whole fund in equal shares to his two sons, Charles Jocelyn Hambro and Richard Everard Hambro. He had during his lifetime made provision for his two daughters outside the trust fund. By this summons the settlement trustees asked, inter alia, whether the appointments in the will of Sir Charles Eric Hambro in favour of Charles Jocelyn Hambro and Richard Everard Hambro operated as a revocation and variation of the appointments by deed to all four children.

Teague for the plaintiffs, trustees of the settlements.

Neville Gray K.C. and *J. V. Nesbitt* for the defendant (Sir) Charles Jocelyn Hambro. Equity will render effective a defective execution of a power in favour of an object who is a son of the donee of the power, if the persons who take in default of appointment are provided for. A second appointment will revoke an earlier appointment if it shows an intention inconsistent with it. These two rules can be combined and applied to the doctrine of implied revocation. [He referred to Farwell on Powers, 3rd ed., c. 7, s. 5, p. 385.] Equity aids the defective execution of a power. In *Cooper* v. *Martin* (1) there was a power to appoint by deed only, not by will. Lord Cairns assumed that an appointment by will would be a sufficient execution of the power to appoint by deed, and said " I should " have had no doubt that the appointment in the will would " have been a revocation pro tanto of the appointment in the " deed."

As to revocation, in *In re Thursby's Settlement* (2) it was held that a purported exercise of a power which did not refer to a subsisting power of revocation had not revoked the earlier appointment ; but the Court of Appeal held that other indicia of intention such as a reference to property which could only pass by the exercise of the powers both of revocation and appointment would have been sufficient to enable the court to hold that the power of revocation had been effectively exercised. In *In re Chatterton* (3) there was no express revocation, but the court found in a later deed a sufficient indication of an intention to revoke. If you read the instrument exercising the power into the instrument creating it, there is no reason why equity should not aid both. In *Braddick*

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(1) (1867) L. R. 3 Ch. 47.

(2) [1910] 2 Ch. 181.

(3) [1946] Ch. 284.

v. *Mattock* (1) the court supplied the defective surrender of a copyhold. [He referred to *Tollett* v. *Tollett* (2).] In *Chapman* v. *Gibson* (3) the principle was stated that the court would supply the defect when an intention to execute the power was shown.

In the present case, the words "during his or her life" must not be taken out of their context. The survivor could not act otherwise than alone, and having regard to the terms of the husband's settlement there is here conclusive evidence of an intention to revoke.

Ungoed-Thomas K.C. and *Coen,* for the defendant Richard Everard Hambro, adopted the arguments presented on behalf of the defendant (Sir) Charles Jocelyn Hambro. The basis of the rule is the benevolent interpretation of the testator's intention. [He referred to Farwell on Powers, 3rd ed., p. 389.] You cannot cut away a power given for life. If there is revocation by deed there is revocation by will. Here the husband's settlement gave to the survivor power of appointment by will. In *Pomfret* v. *Perring* (4) the will operated on unappointed interests, and in *In re Thursby's Settlement* (5) there was unappointed material on which the second appointment could operate.

Raymond Jennings K.C. and *G. D. Johnston* for the defendant Zelia Mary Osborne and Juliet Carin Hambro. There are two mains questions (1.) will equity validate a revocation by will which should have been made by deed? (2.) will equity treat an appointment as being a revocation of a previous appointment if it is not expressed to be such? There is no authority for an affirmative answer to the first question. The judgment of Lord Cairns L.J., in *Cooper* v. *Martin* (6) can only be understood by considering what Stuart V.C., had decided, and if rightly interpreted cannot be prayed in aid. Rolt L.J. stated the general principle on p. 57, but on p. 58 he said that equity would never uphold an act which would defeat what the creator of the power had declared to be material. To apply the rule both to the intention of the person exercising the power and to that of the creator of it would be a very substantial extension for which there is no authority. The gifts should not be taken away otherwise than in the way the creator of the power intended. Here the appointment was to be made by

(1) (1822) 6 Madd. 361.
(2) (1728) 2 Peerė W. 489.
(3) (1791) 3 Bro. C. C. 229.
(4) (1854) 5 De G. M. & G. 775.
(5) [1910] 2 Ch. 181.
(6) L. R. 3 Ch. 47.

deed "during his or her life." In *In re Walker* (1) a revocation was implied in a codicil to the extent that it interfered with the appointment in the will. In *Morse* v. *Martin* (2) it was a defective appointment, not a defective revocation, which was aided. Even if the will is treated as a deed, there has been no revocation. It is wrong to say that a second appointment will revoke an earlier appointment if it is inconsistent with it. The court must find an intention to revoke. See *Pomfret* v. *Perring* (3). In *Cooper* v. *Martin* (4) the will was made five days after the deed; that implied revocation, not forgetfulness. Revocation is not to be implied wherever the second appointment is inconsistent with the earlier one.

[ROXBURGH J. Where you have a deed which is nugatory unless it revokes, must you not then construe it as a revocation?]

There is no such principle; the court must find an intention to revoke. An appointment made jointly requires more consideration than one made singly. Here the appointment made by will was seven and a half years after the first appointment, to which there was no reference. The court is not bound to assume an intention, it must find one. In *Pomfret* v. *Perring* (3) the second appointment could operate without affecting the previous one. Knight Bruce L.J. said there "the "words do not of themselves exhibit an intention to revoke."

[ROXBURGH J. But if an "intention" exists which cannot be effective unless it revokes, must it not be so construed?]

The intention means an intention to revoke. There is no artificial rule to imply an intention if the second document cannot be effective. In *In re Thursby's Settlement* (5) Farwell L.J. said "You have to find as a condition precedent an "intention to revoke." [He referred to Farwell on Powers, 3rd ed., pp. 392, 393.]

ROXBURGH J., having set out the relevant provisions of the will, said it was important to observe that the power of revocation conferred upon the survivor was to be exercised "during "his or her life" and by deed and did not extend to the appointment in favour of the eldest son.

His Lordship referred to the facts and continued: It was submitted by Mr. Gray and by Mr. Ungoed-Thomas that the will operated to exercise the power of revocation reserved by the

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(1) [1908] 1 Ch. 560.

(2) (1865) 34 Beav. 500.

(3) 5 De G. M. & G. 775.

(4) L. R. 3 Ch. 47.

(5) [1910] 2 Ch. 181.

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appointment over thirteen-twentieths of the husband's trust fund because (1.) it was intended so to operate; (2.) the doctrines relating to the defective execution of powers applied to defective execution of powers of revocation; and accordingly (3.) persons indefeasibly entitled upon the death of the survivor of the donees of the power ought to be deprived of their beneficial interests because that survivor, by making a will which had no operation during his lifetime, should be deemed to have revoked an appointment "during his life." Mr. Jennings contests all these submissions.

It is conceded that there is no precedent for taking such a course. Although it would be extremely difficult to reduce to a logical system the various cases relating to defective execution of powers which seem to have their venerable roots in copyhold tenure, I should not shrink from the attempt if I thought that it would help me to decide this case. But, after further reflection, I have come to the conclusion that, as I am in any event breaking new ground, I should not be prepared to transplant these doctrines if the result would be to divest vested interests by the process of treating a will which had no operation until death as equivalent to the exercise by the donee of a power to revoke by deed during his life. Such a process would, in my judgment, do violence to good language and good sense. If, on the other hand, the transplantation of those well-established doctrines would not warrant such a process, they cannot aid Mr. Gray and Mr. Ungoed-Thomas.

Declaration accordingly.

Solicitors for the plaintiffs: *Hawes & Udall.*

Solicitors for the defendants Sir Charles Jocelyn Hambro and Richard Everard Hambro: *Broad & Son.*

Solicitors for the defendants Zelia Mary Osborne and Juliet Carin Hambro: *Haslewood, Hare & Co., for Basset & Boucher, Rochester.*

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Oct. 26, 27;
Nov. 5.

Followed. *In re* HOWELL, DECD. [1952] 1 Ch. 264

In re SHEPHERD, DECD.

PUBLIC TRUSTEE *v.* HENDERSON AND OTHERS.

Will—Estate duty—Legacy duty—Settled legacy—"Free of all legacy "and other death duties"—Incidence of duties on death of life tenant —Whether payable out of residuary estate or out of capital of settled legacy—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35); *s.* 49.

The testator by cl. 16 of his will bequeathed the sum of 20,000*l.* to his trustees on trust for his grand-daughter for her life and after her death, in the event which had happened, to her daughter absolutely. By cl. 17 he directed: ". . . . all the before-mentioned "legacies and specific and pecuniary bequests (whether settled or "otherwise) and all the said annuities whensoever payable shall be "paid free of all legacy and other death duties (if any) and that "all such duties shall be paid out of my residuary estate." By cl. 20 he directed his trustees "to make provision for the payment "of . . . . duties on any legacies . . . . bequeathed free of "duty."

Held (i.) There is a presumption that a testator only intends to provide for the payment of the duties arising on his own death and to rebut it a clear intention to provide for the payment of future duties must be found.

(ii.) In the present case the testator, by cl. 17, intended the exoneration from duties to be confined to those arising on his own death. Accordingly estate duty payable on the death of the life tenant of the settled legacy should be paid out of the capital of that legacy, and not out of the residuary estate of the testator.

(iii.) Legacy duty payable under the Legacy Duty Act, 1796, on the death of the life tenant should be paid out of residue.

(iv.) Legacy duty under s. 49 of the Finance Act, 1947 was merely an increase in the rate of the existing legacy duty and that leviable on the death of the life tenant should similarly be paid out of residue.

In re Laidlaw [1930] 2 Ch. 392 and *In re Wedgwood* [1921] 1 Ch. 601 applied.

In re Stoddart [1916] 2 Ch. 444 considered.

ADJOURNED SUMMONS.

By his will dated March 19, 1919, the testator, William Shepherd, gave various pecuniary and specific legacies, and certain annuities, some immediate and some deferred. By cl. 16 of his will he bequeathed the sum of 20,000*l.* to his trustees on trust for his grand-daughter Dorothy Frances Henderson for her life, and after her death, in the event which had happened, to her daughter, Patricia Valerie Moxon Simmon absolutely. By cl. 17 the testator directed: "I declare that all the before "mentioned legacies and specific and pecuniary bequests

" (whether settled or otherwise) and all the said annuities " whensoever payable shall be paid free of all legacy and " other death duties if any and that all such duties shall be " paid out of my residuary estate."

Clause 18 contained a power to provide for the payment of annuities by appropriation in exoneration of the rest of the estate. By cl. 19 the testator gave the residue of his estate to his trustees upon the usual trusts for sale and conversion. By cl. 20 he directed his trustees to pay his funeral and testamentary expenses and " make provision for the payment " of the annuities hereinbefore bequeathed and the duties on " any legacies annuities or bequests bequeathed free of duty " and shall hold the residue of the said proceeds of sale and " conversion in trust for such hospital or hospitals in London " as my trustees may in their absolute discretion select . . . ." The testator died on April 20, 1919.

The questions asked by the summons were whether the following duties should, on the death of the tenant for life of the settled legacy, be paid (*a*) out of the capital of the said legacy or (*b*) out of the residuary estate of the testator : (1.) estate duty ; (2.) legacy duty at 1 per cent. leviable under the Acts in force prior to the death of the testator, and (3.) legacy duty leviable at the additional rate of 1 per cent. under s. 49 of the Finance Act, 1947 (1).

The tenant for life, Dorothy Frances Henderson was still alive, but it was a matter of convenience that these questions should be determined now.

Jackson Wolfe for the plaintiff trustee under the will.

E. M. Winterbotham for the life tenant and remainderman of the settled legacy : Prima facie the question has to be determined on the construction of the particular will : *In re Palmer* (2), *In re Sutherland* (3). It is clear from cl. 17 that the testator intended the payment of all death duties to be made out of his residuary estate, even long after his own death. This is strengthened by cl. 20, by which he makes " provision " for the payment " not only of his funeral and testamentary expenses but also of " duties on any legacies," *In re Stoddart* (4).

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(1) Finance Act, 1947, s. 49 : " (1.) On every legacy subject to " legacy duty under the existing " law . . . . there shall be charged " a further legacy . . . . duty " . . . . at a rate equal to that of " the duty to which it is subject " under the existing law . . . ."

(2) [1916] 2 Ch. 391, 398, 401.

(3) [1922] 2 Ch. 782, 788, 789.

(4) [1916] 2 Ch. 444, 447, 448.

The word "provide" has been held to be important on the question of payment of future duties, *In re Sutherland* (1), *In re Stoddart* (2), *In re Laidlaw* (3). He must, therefore, also have contemplated the payment of future duties. The testator did not think that the residue would be ascertained for a considerable time, he directed the payment of subscriptions to certain charities for twenty years and he gave future annuities. If the distribution of the residue is held up, it should be inferred that the direction to pay duties is intended to include future duties. Where a particular time can be seen when a legacy will be handed over the estate duty payable on the death of the tenant for life may come out of residue. *In re Laidlaw* (3) is distinguishable because in that case the testator meant the residue to be ascertained within about a year, and therefore the direction to pay free of duties was confined to those arising on the death of the testator. It is difficult to give any meaning to the words "settled or otherwise" if future duties are not included. The critical words of this will in cl. 17 are comprehensive "all other duties." (Counsel also referred to Hanson on Death Duties, 9th ed. 139.) The executors are bound to pay legacy duty under the Acts in force at the time of the will out of residue: *In re Wedgwood* (4). They are obliged to pay it at whatever rate the Government happens to impose. The duty imposed by s. 49 of the Finance Act, 1947, is the payment of the same duty, but merely at a different rate. Even if this were a new duty, the words in the will "all duties" are wide enough to include it.

H. O. Danckwerts for the Attorney-General. The distinction whether or not future duties are payable out of residue was stated in *In re Wedgwood* (5) to be whether the testator meant all duties arising in consequence of his death, or arising in consequence of the dispositions made by his will. In the present case there are no words such as "to be paid and enjoyed." as there were in *In re Stoddart* (2), indicating that the testator intended the payment of future duties to be made out of residue. There is a presumption that a testator only means duties payable on his death unless there are clear words to the contrary: *In re Laidlaw* (3). Clause 17 indicates the date of payment of the legacy. The words "settled or otherwise" mean that the date of payment to the life tenant is the moment when the legacy is free of duty. From that time the residue is to be free of duties. There are no future settled legacies. The powers of appropriation show an intention to free the residue and allow its distribution among the hospitals to whom it was given. The testator contemplated that the bulk of the residue would be distributed within a reasonable time, in fact this was not done. On the principle of *In re Wedgwood* (1) this duty should be borne by the settled legacy and not by the residue The legacy duty under the Acts in force at the time of the will is admittedly payable out of residue. But the legacy duty under s. 49 of the Finance Act, 1947, was not in existence at the date of the will, and was not anything for which the will could provide. Duty under s. 49 could not therefore be within the exemption of cl. 17.

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(1) [1922] 2 Ch. 782, 788, 789.
(2) [1916] 2 Ch. 444, 447, 448.
(3) [1930] 2 Ch. 392, 398.
(4) [1921] 1 Ch. 601, 615.
(5) Ibid. 613.

HARMAN J.: I will deal with the estate duty first. The question is whether the words conferring freedom from duty are confined to duties arising in consequence of or on the testator's death, or extend to all duties arising in consequence of the dispositions made by his will. (See the judgment of Lord Sterndale M.R. in *In re Wedgwood* (2).)

The answer to this is a question of construction depending on the particular will under consideration. (See the judgments of Lord Cozens-Hardy M.R. and of Pickford L.J. in *In re Palmer* (3).) It is, therefore, a question of ascertaining the testator's intention from the words he has used, but it is fair to say that there is by now a presumption that a testator only intends to provide for such duties as are payable by reason of his own death and that to rebut this presumption a clear intention to provide for further duties must be found. (See the judgment of Eve J. in *In re Laidlaw* (4).)

There have been a great number of cases on this question, and I find it stated in Hanson on Death Duties, 9th ed., 139, that, since the decision of *In re Wedgwood* (2) above noted, there has only been one English case in which the wider construction has been adopted. That case is *In re Jones* (5). There the words were so wide, namely, "the due carrying out or giving effect of the "dispositions made" by the will, "or incorporated in or "incidental to the due administration of my estate," that they

(1) [1921] 1 Ch. 601.
(2) Ibid. 613.
(3) [1916] 2 Ch. 391, 398, 401.
(4) [1930] 2 Ch. 392, 396.
(5) [1928] W. N. 227.

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left no room for doubt; but, short of some such expressions, it is hard now to think of a form of words which would be construed in the wider sense.

In the case of *In re Stoddart* (1), Sargant J. took the wider view, relying on the direction that legacies should be "paid and "enjoyed" free of duty, and a further direction to the trustee to "provide for" all duties. Words hardly less strong appear in *In re Laidlaw* (2), already referred to; but Eve J. did not feel that they justified him in taking the wider view. He relied for the contrary view on an indication that the testator there anticipated that the amount of his residue would be known within a short time.

What, then, are the indications here? Clause 17 simply refers to payment and not to enjoyment, and this is in favour of a narrow view. On the other hand, cl. 20 uses the words "make provision for" which were so much relied upon by Sargant J. in *In re Stoddart* (1); and it is urged upon me that this testator clearly contemplated that the administration of his estate would remain open for a long time, having regard in particular to the authority given to his trustees to continue for twenty years to pay charitable subscriptions and that, therefore, the argument as to convenience has no force. On the other hand, there is a positive direction to set apart this 20,000*l.* fund at once, and that has always been taken as an indication that no further calls on residue shall come from that quarter. There is, in addition, the authority to appropriate for the rest of the annuities, and it is urged that the direction about making provision for duties is satisfied by the legacy duty with which I shall have to deal under question 2. On the whole, I come to the conclusion that the narrower view is right and that, when the testator directed that this legacy should be paid free of duty, he referred to the period when it was paid to the trustees by his executors, and it matters not that at that time the executors and trustees were the same persons. Consequently I answer question 1 by the alternative (*a*).

As to question 2, it was not disputed that the 1 per cent. legacy duty under the Legacy Duty Act, 1796, whch will arise on the death of the first defendant, is payable out of residue. The reason for this is explained in *In re Wedgwood* (3), and the position is well settled. Legacy duty, where payable at different rates on a settled legacy, is not exigible on the testator's

(1) [1916] 2 Ch. 444, 447.

(2) [1930] 2 Ch. 392.

(3) [1921] 1 Ch. 601, 611.

death except on the value of the first life interest but it is, nevertheless, a sum owing to the Crown debitum in præsenti, solvendum in futuro. Freedom from this duty was therefore enjoined by the will on any view, and residue must bear it.

Question 3 is necessarily a novel one. The Finance Act, 1947, by s. 49, imposed what is called "a further legacy duty" and it is said that this, not having been a duty which arose or was charged at the testator's death, is a future duty and falls into line with the estate duty under question 1 and not the legacy duty under question 2. If this be right, it results in one of those absurdities arising out of a subtlety of the law which makes it stink in the nostrils of the public, who cannot understand why what is in effect one half the legacy duty should be drawn out of one fund and the other out of another. I say "in effect" because in practice what the section does, is to double the duty and that event has happened, which Lord Sterndale M.R. in *In re Wedgwood* (1) considered a bare possibility so unlikely as to be negligible.

In my judgment, this is the effect of the new section at law as well as in practice, and I hold that the so-called new duty is merely a raising of the rate of the old duty and that the two fall upon the residue together.

Declarations accordingly.

Solicitors for plaintiff: *Moon, Gilks & Moon.*

Solicitors for the first two defendants: *Savory, Pryor & Blagden.*

Solicitor for the third defendant: *The Treasury Solicitor.*

I. G. R. M.

(1) [1921] 1 Ch. 601, 611.

In re BIDIE, DECD.

BIDIE *v.* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

C. A.
1948
Nov. 10, 11.
Lord Greene M.R., Somervell and Evershed L.JJ.

Husband and wife—Maintenance order—Arrears—No claim against estate of deceased husband—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict., c.* 39), *s.* 9.

Family provision—Statutory time limit for making application—Letters of administration granted—Revocation on discovery of will—Probate —Application made within six months of probate but not of letters of

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Bidie, decd., In re.
Bidie v. General Accident Fire and Life Assurance Corporation, Ld.

administration—" Representation . . . . to the testator's estate . . . . " first taken out "—Summons within time limit—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 2. *sub-s.* 1.

A wife cannot recover against the estate of her deceased husband arrears of maintenance payable under an order made under the Summary Jurisdiction (Married Women) Act, 1895. Her only remedy is that provided by that Act itself, and it does not survive the husband's death. For this purpose there is no distinction between alimony payable under an order of the Divorce Court and maintenance payable under an order of a court of summary jurisdiction.

By s. 2, sub-s. 1, of the Inheritance (Family Provision) Act, 1938: " an order under this Act shall not be made save on an " application made within six months from the date on which " representation in regard to the testator's estate for general " purposes is first taken out."

Where owing to the will of a testator not being found letters of administration as on an intestacy were granted, but later, on the will being found, the letters of administration were revoked and probate of the will granted :—

Held that an application made less than six months after the grant of probate but more than six months after the grant of letters of administration was made within the statutory limit.

The Act only admits of applications for maintenance by a dependant or dependants not properly provided for in a testator's will, so that no application is possible until after probate or letters of administration with the will annexed had been granted, and the words " representation in regard to the testator's estate " in s. 2, sub-s. 1, must be construed as referring to representation under a will.

Decision of Jenkins J. [1948] Ch. 697 affirmed on the first point as to the claim for arrears of maintenance and reversed on the second point.

Per SOMERVELL and EVERSHED L.JJ. It seems probable that when after a will was proved a later will was discovered and proved, the six months for an application under the Act of 1938 in respect of the later will fixed by s. 2, sub-s. 1, runs only from the date of the proof of the later will.

APPEAL from Jenkins J. (1).

On November 2, 1903, the plaintiff, then Lily Sophia Olliver married Francis William Bidie (hereafter called " the testator ") and there were four children of the marriage. On December 17, 1923, the plaintiff obtained from the justices of Banbury under s. 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895 (2), a separation order on the grounds of the testator's cruelty and under s. 5 (*c*) an order for payment to the plaintiff of maintenance of 2*l*. a week for herself and 10*s*. a week for the two younger children until they were sixteen years old. From the date of the order until March 8, 1928, the testator made irregular payments and in 1929 he was adjudicated a bankrupt. From March 8, 1928, until the testator's death on January 16, 1945, no maintenance was paid. The plaintiff was unaware of the testator's whereabouts and she worked to maintain herself and the two young children (assisted by her son William after he became fourteen years old) until 1932, when she broke down in health. For about a year she received parish relief of 5*s*. a week. The arrears of maintenance during the twelve years preceding the testator's death amounted to 1,248*l*.

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(1) [1948] Ch. 697.

(2) Summary Jurisdiction (Married Women Act, 1895 s. 5 (*c*), the magistrates may order " that " the husband shall pay to the " applicant personally . . . . such

By his will dated February 10, 1937, the testator after appointing executors bequeathed his residuary estate subject to payment of debts, funeral and testamentary expenses, to his daughter Dolores Pandora Vercoe and his son Maxwell Terence Bidie Cerisola, who were not the plaintiff's children, in equal shares. Nothing was left to the plaintiff or the children of the marriage. This will was not found on the testator's death and letters of administration to his estate was granted on April 13, 1945, to the plaintiff and one of his sons, but upon the will being found this grant was revoked and probate of the will was granted on September 7, 1946, to the General Accident Fire and Life Assurance Corporation Ld.

On January 8, 1947, the plaintiff took out a summons asking: (1.) for a declaration that under the order of the justices dated December 17, 1923, and in the events which had happened, the plaintiff was entitled to be paid out of the assets of the testator the sum of 1,248*l*. being arrears of maintenance for twelve years prior to the testator's death; (2.) that such reasonable provision as the court should think fit subject to such conditions and restraints (if any) as the court may impose be made out of the testator's estate for the plaintiff's maintenance. The second of her claims for relief was made under the Inheritance (Family Provision) Act, 1938, and the

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"weekly sum not exceeding two "pounds as the court shall, "having regard to the means "both of the husband and wife, "consider reasonable."

Section 9: "The payment of "any sum of money directed to "be paid by any order under this "Act may be enforced in the "same manner as the payment "of money is enforced under an "order of affiliation." Section 4 of the Bastardy Amendment Act, 1872, provides that orders under that Act shall be enforced by distress and committal.

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defendants took the preliminary objection that as this application was made more than six months after the grant of letters of administration, though less than six months after the grant of probate, it failed to comply with s. 2, sub-s. 1, of the Act (1), and must be dismissed. Jenkins J. dismissed both applications holding that arrears of maintenance could not be recovered out of the husband's estate and that the application under the Act of 1938 was not within the time fixed by s. 2, sub-s. 1.

The plaintiff appealed.

Pennycuick K.C. and *Mulligan* for the appellant. The appellant is entitled to claim against the testator's estate as a creditor in respect of the arrears of maintenance payable to her under the order of the justices. At common law a wife could have pledged her husband's credit but she could not have sued him. The Summary Jurisdiction (Married Women) Act, 1895, gave to a wife a new right and a new remedy. It has been held by the Court of Appeal that a wife cannot prove in her husband's bankruptcy for future alimony, *Linton* v. *Linton* (2). Sargant J. in *In re Stillwell* (3) said that alimony was a judicial assessment of a husband's liability to maintain his wife and he there held that arrears of alimony under a judicial separation were recoverable against a husband's estate. That decision was followed in *Firman* v. *Royal* (4). It was dissented from in *In re Hedderwick* (5) and *In re Woolgar* (6). If it has to be conceded that maintenance is not a debt enforceable in the ordinary way, on the other hand it was a liability of the testator when he died and the method of enforcing the liability laid down by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, having then ceased, it became enforceable as an ordinary debt against his estate and his executors are bound to pay the appellant the arrears of maintenance. This is the case of a solvent estate and not an insolvent estate where only debts provable in bankruptcy will

(1) The Inheritance (Family Provision) Act, 1938, s. 2, sub-s. 1, provides : " . . . . an order under " this Act shall not be made " save on an application made " within six months from the " date on which representation in " regard to the testator's estate " for general purposes is first taken " out."

(2) (1885) 15 Q. B. D. 239.

(3) [1916] 1 Ch. 365.

(4) [1925] 1 K. B. 681.

(5) [1933] Ch. 669.

(6) [1942] Ch. 318.

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be paid. The testator was always under a common law liability to maintain the appellant. An order to pay maintenance made under the Act of 1895 created a liability in the nature of a debt. It is submitted first that the remedy for enforcing payment in s. 9, which is introduced by the word "may", is a permissive remedy only and in addition to the ordinary remedy by action to enforce the debt; alternatively, if the remedy by action for debt is suspended during the lifetime of a husband such remedy comes into being on his death. The appellant relies on the decision in *In re Stillwell* (1).

Mulligan on the same side. The effect of r. 62 (1.) of the Matrimonial Causes Rules, 1944 (2) is that an order for payment of alimony may be enforced by writ of fieri facias. The decisions *In re Hedderwick* (3) and *In re Woolgar* (4) are based on a wrong view of the effect of the rule and cannot stand.

J. H. A. Sparrow for the respondent, the testator's daughter Dolores Pandora Vercoe, a beneficiary under the will, was not called on.

Oliver Lodge for the respondent Maxwell Terence Bidie Cerisola the testator's son, a beneficiary under the will was not called on.

B. S. Tatham for the testator's executors.

LORD GREENE M.R. The arguments in this case have not led me to think that the learned judge's judgment is in any respect inaccurate. It will be no disrespect to those arguments if I say that I agree with that judgment and am content to adopt it as my own.

There is only one point which requires mentioning, and that is the reference to r. 62 of the Matrimonial Causes Rules, 1944. It was suggested by Mr. Mulligan that the two cases of *In re Hedderwick* (3) and *In re Woolgar* (4) were wrongly decided in view of that rule. It is worth noticing that in neither case was any suggestion argued that the rule affected the matter at all. In *In re Hedderwick* (3) counsel did not, apparently, think it worth referring to; and in *In re Woolgar* (1) it was referred to, not as governing the case, but on the assumption that it did not govern the case and that its effect had been altered by a later rule, r. 81. I might also say that those rules do not apply to the present case, which has nothing to do with the Matrimonial Causes Rules.

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(1) [1916] 1 Ch. 365.

(2) The Matrimonial Causes Rules, 1944, r. 62 (1.) provides: "In default of payment to any "person of any sum of money at "the time appointed by any order "of the court for the payment "thereof, a writ of fieri facias, "sequestration, or elegit shall be "sealed and issued as of course "out of the Divorce Registry "upon an affidavit of service of "the order and of non-payment."

(3) [1933] Ch. 669.

(4) [1942] Ch. 318.

As a result, the appeal on this particular point, in my opinion, fails.

Somervell L.J. I agree.

Evershed L.J. I agree.

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The appeal on the preliminary objection was then heard.

Pennycuick K.C. and *Mulligan* for the plaintiff. In deciding what is the operation of the six months' limit imposed by s. 2, sub-s. 1, of the Inheritance (Family Provision) Act, 1938, regard must be had to other provisions of the Act and in particular to s. 1, sub-ss. 1, 4 and 6, in order to show that its subject matter applies only in regard to wills that do not provide properly for what are called dependants. On an intestacy the law provides for the wife and young children. In s. 2, sub-s. 1, "representation" must, having regard to the context, by a "representation that enables an application to be made under the Act within six months. "Representation" must mean a representation relevant to the Act. That can only refer to probate of a will or letters of administration with the will annexed. For the purpose of s. 2, sub-s. 1, therefore letters of administration where there is no will annexed cannot be a material representation. If it was intended to impose such a time limit as Jenkins J. found it would need to be expressly provided for. [They referred to *In re Dorgan* (2).] Of course if the words of s. 2, sub-s. 1, were clear, the absence of any provision protecting an applicant in such a case as this would have to be treated as a casus omissus, but there is no reason for arriving at this conclusion, especially as the representation referred to in s. 2, sub-s. 1, is "in regard to the testator's "estate." "Testator" cannot be treated as applying to an intestate and the limiting period is one during which it can be predicated that the estate being dealt with is that of a testator.

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(1) [1942] Ch. 318.

(2) [1948] Ch. 366.

Words in statutes must be construed with due regard to their contents and objects.

Sparrow for the testator's natural daughter Pandora. Section 2, sub-s. 1, should be given a simple construction and the taking out of representation referred to in the sub-section must cover the taking out of letters of administration. It makes no difference that no application could be made under the Act during the period until probate is obtained. It is not right to construe the sub-section on any but its clear words.

[SOMERVELL L.J. Might not the sub-section be treated as referring to the representation which permits an application under the Act ?]

That is not the only consideration. Representation includes any kind of grant. If representation includes taking out letters of administration the court cannot depart from it. The whole aim of s. 2, sub-s. 1, was presumably to prevent any interference with a deceased person's mode of dealing with his estate except within a short time. To carry out that intention here the six months period must date from the grant of letters of administration. Consideration should not be taken of hardship to vary the meaning of the sub-section. If indeed there is a casus omissus creating the hardship in this case, it is for the legislature to remedy it.

Oliver Lodge for the testator's son Terry. I adopt the argument of Mr. Sparrow that the application is out of time. In this Act Parliament was creating a new right and it did not seek to ensure that every conceivable case of hardship caused by a testator's mode of dealing with his estate should be relieved, though it did so in a very large percentage of possible cases. The Act was taking away the right of a testator at common law to dispose of his property as he wishes. The Act then should be construed strictly. He referred to *In re Searle* (1). The draftsman of this Act has been presumably guided by earlier Acts of the same nature in Australia and Canada.

No reply was called for.

LORD GREENE M.R. This part of the appeal relates to so much of the application before Jenkins J., as asked for relief under the Inheritance (Family Provision) Act, 1938. The learned judge came to the conclusion that on the true construction of the relevant provisions of the Act the plaintiff who was the widow of the testator was excluded from any right to obtain relief by the operation of what I may call the limitation section in the Act.

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(1) (1948) 64 T. L. R. 397.

The testator died on January 16, 1945. He made a will dated February 10, 1937, leaving his estate to his two natural children, who are the respondents to this appeal. The will, therefore, was one which did not make any provision for the maintenance of the widow, and subject to the widow being able to satisfy the court under s. 1 of the Act that no reasonable provision for her maintenance was made the court could make an order in her favour directing that such reasonable provision as the court should think fit should be made out of the testator's net estate for her maintenance.

It follows that if that will had been proved in the ordinary way, the widow unquestionably would have had a locus standi to apply for relief and, subject to her being able to satisfy the court on the relevant matters, would have been entitled to ask the court for an appropriate order. She is clearly a person who prima facie belongs to the class of dependants which the Act was designed to help.

The Act is described in its title as " An Act to amend the law " relating to testamentary dispositions." It is concerned, and concerned only, with testamentary dispositions. The Act does not seek to amend the law relating to the distribution of intestates' estates. The legislature obviously was of opinion that the class of dependants named in the Act was sufficiently provided for by the existing law in the case of an intestacy. It therefore set itself to deal, and deal only, with the case where, by means of his testamentary disposition, a testator has displaced the succession which would have taken place if he had died intestate. The Act, therefore, as its basis, and as the only circumstance in which it can have any operation, requires the existence of a will that does not make reasonable provision for the class of dependants named. This summons was taken out on January 8, 1947, that is to say within six months from the grant of probate but after the expiration of about a year and three-quarters from the grant of letters of administration. It is to be observed that it was not competent for the widow to make any application under the Act, and that it was not competent for the court to make any order under the Act, until the will was proved fifteen months after the grant of the letters of administration.

It is said that the result is to deprive the widow for ever of any opportunity of applying to the court for any kind of relief under the Act. It is to be observed that if that is the effect of the language used it is for this court to give effect to it even though it thinks the result capricious or unjust. The capriciousness or injustice of a particular result is a matter to which the court can pay attention in deciding what is the true construction of the words used; but too much weight must not be given to that circumstance: it is the right of the legislature, if it so wishes, to be capricious or unjust. Indeed, the legislature may know more than the court knows, and what appears unjust or capricious to the court may not appear so to the legislature on its broader knowledge of the facts. I therefore do not attach in this case any particular weight to what might be thought to be injustice or capriciousness. I will confine my remarks to pure matters of construction of the relevant words in their context.

I turn at once to the limitation provision in s. 2, sub-s. 1 of the Act. It is as follows: " Except as provided by section " four of this Act "—a section which has no bearing on the present question—" an order under this Act shall not be made " save on an application made within six months from the " date on which representation in regard to the testator's estate " for general purposes is first taken out."

It is argued on behalf of the defendants that the word " representation " is to be given its widest meaning as including not merely the grant of probate but also the grant of letters of administration, and the learned judge found it possible to adopt that construction although as a result of including a grant of letters of administration it would be impossible for a widow in the case of an after-discovered will ever to get any relief under the Act if the letters of administration remained on foot for the period of six months. The learned judge, it is fair to say, arrived at that conclusion with regret. I myself would share his regret if I felt constrained to put upon it the same construction as he did. The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of prima facie meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question : "In this statute, in "this context, relating to this subject-matter, what is the true "meaning of that word ?" In the present case, if I might respectfully make a criticism of the learned judge's method of approach, I think he attributed too much force to the abstract or unconditioned meaning of the word "representation." No doubt in certain contexts the word "representation" would be sufficient to cover not merely probate, not merely letters of administration with the will annexed, but administration simpliciter. The real question that we have to decide is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy.

Looking at the general context of the Act, I think these observations are relevant. First, it is limited in its application to cases where there are testamentary dispositions. No order can be made, no order can be applied for, unless a will is produced ; and under the rules made to govern the administration of this Act by the courts, production of probate or of letters of administration with the will annexed is compulsory before the court can make an order. Indeed, under the Act itself any order that the court may make must be transmitted to the probate registry in order that it may be annexed to one or other of those two documents. That being the general object of the Act, when I find the word "representation" in what I may call the limitation sub-section, I first ask myself quite broadly what sort of representation must be meant. The relevant "representation" under the general scheme of the Act is that representation which when granted gives the court jurisdiction to apply the provisions of the Act. It must be limited then to a case when a grant is made of probate or letters of administration with the will annexed, because it is only when there is a will that the court has any power to do anything under the Act. That seems to me to be a legitimate way of approaching the construction of the word "representation" in this sub-section on broad lines. Moreover when I come to the immediate context I find expressions which satisfy me that the word "representation" cannot have been intended by the legislature to extend to anything but what I have called the relevant representation for the purposes of the Act : that is, a representation under a probate or letters of

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administration with the will annexed. The language of the sub-section appears to me to assume quite clearly, if indeed it does not affirm, that the period of six months spoken of is a period during which an application may be made. What it is contemplating is a period of six months during which an application made be made, and it is saying: "If you allow "that period to elapse then you cannot apply thereafter." I cannot read those words as contemplating that the period of six months referred to would be, so to speak, a dead period during which no application could possibly be made.

If I may make one further respectful criticism of the learned judge's approach, he appears to have laid too much emphasis on the bare word "representation" and too little emphasis on the preceding words which provide that an order under the Act "shall not be made save on an application made within "six months from the date" of the representation. Reading the whole of the sentence, I think it can only be understood to involve the six months being not a dead period but a live period. I suggested to Mr. Sparrow that if the section had said "application may be made within six months from the date on "which representation is first taken out," the word "representation" could not possibly have been construed as extending to a mere grant of letters of administration, and I think he agreed. Indeed, I think he would have had to agree; and, although the section is not actually drafted in that form, it is drafted on similar lines. There is another phrase to which the learned judge did not attach any particular importance but which strikes me as being confirmatory of that view. The representation dealt with by the section is a representation "in regard to the testator's estate." The sub-section assumes, in my view, that during the whole of the six months there will be in existence something which during that period can be called a "testator's estate." While letters of administration are ruling and before they have been displaced by a subsequent grant of probate it is impossible to predicate of the deceased that he is a "testator." The way in which it is sought to overcome this argument, is by saying that the subsequent discovery of the will and the grant of probate of that will attached to him the quality of being a testator so that during the whole of the six months after the grant of letters of administration he was in fact a testator because he had left a will. I myself find great difficulty in reading those words in that rather artificial sense. It seems to me that, as the existence

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of a will and the failure of the testator in that will to make provision for the dependants is the whole basis and substratum of the Act, the words assume that during the six months limitation period there will be in existence a "testator's "estate." Here there was not during that period an estate which could in law be described as a "testator's estate"—I say this advisedly, because I do not think any court could describe as a "testator" a person in respect of whom there had been a grant of letters of administration which had not been displaced; he would not be a "testator" and it would not be true to say that during that period he was a "testator" within the meaning of the sub-section. I find myself with all respect to the learned judge, in no real difficulty in the construction of these words.

There is one further point of a general nature that I might make. The plaintiff, prima facie, falls within the class of person entitled to ask for an order under the Act. The effect of this limitation section is not to take her out of that class of person; it deals with people who are, it is assumed, within that class of person but who are excluded from the benefit of the Act if they allow a certain time to elapse. I can well understand the good sense, in an Act of this kind, of putting a limitation section in the Act. But if this section had the effect contended for by the defendants it would have the strange effect of making the period of limitation run during a time when the person intending to make an application under the Act cannot possibly make it. The right to make an application never arose during the six months' period, and the result of the learned judge's construction would be to construe this limitation section as applying not to a person who has been dilatory in enforcing a right but to a person who never had the chance of enforcing it. The legislature may intend such things, of course, and I give full weight to the broad suggestion that certainty is a desirable thing and that it is not really fair to disturb people who have mapped out their lives on a particular basis; but it has to be remembered, I think in considering the matter of hardship, that the whole Act operates on the footing that a particular limited class of dependant has suffered hardship because a testator has not made the provision which the legislature thinks ought reasonably to be made: therefore it is dealing with people who are suffering a hardship, and if the defendant's argument prevailed the effect of the limitation section would be to deprive such people of a remedy which they never had any chance of applying for.

There is another provision in the Act to which the learned judge attached importance, but before I come to that I will refer to another matter more germane to s. 2, sub-s. 1. The learned judge found that the construction argued for by counsel for the widow lacked logic, and as his reason for saying so he mentioned the case where there was a will proved and then more than six months afterwards another will turns up and the probate of the first will was revoked. "What," he asked, "happens to the six months' limitation period in such a case." He formed the view, apparently, that in such a case the limitation period would run from the representation granted in respect of the first will and he thought it illogical to say that where the first, the earlier, representation granted, was not a probate but letters of administration, a similar result would not follow. With all respect to the learned judge, I do not agree with this reasoning. The case of the two wills was not the case before him, and it seems to me that different considerations may or may not apply to the case of two wills, and that it will be time enough to deal with that problem if and when it arises. There is a fundamental difference between the two cases, and I must not be taken to be suggesting what I would think the proper way of dealing with the case of the two wills: I am merely pointing out a difference between that case and the present case. It is that in the case of letters of administration there is no possibility of making an application under the Act. Where there has been probate there is such a possibility so long as the will stands. Different considerations therefore may well apply. I shall say nothing more about that. I propose to decide this case on the exact question raised before us and the considerations which appear to me to be relevant to this question. I must not be taken as expressing any opinion as to the correctness of the learned judge's view in regard to the case of the two wills; I express no opinion one way or the other. I propose to leave it to be decided when it arises. The other matter to which I wished to refer was a point made by the learned judge on s. 3, sub-s. 3. That is a procedural section, and it reads as follows: "An office copy of every order made "under this Act shall be sent to the principal probate registry "for entry and filing, and a memorandum of the order shall be "endorsed on, or permanently annexed to, the probate of the "will of the testator or the letters of administration with the "will annexed, as the case may be." I am bound to say that

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when I first read that sub-section I thought it supported the argument of the plaintiff. The learned judge did not so read it. He found that it confirmed the view that he himself had formed, and this, I think, was his reason. He said: "In s. 2, sub-s. 1, the legislature has used the general phrase "'representation.' It could have said 'probate' or 'letters "'of administration with the will annexed.' It did not do so. "But when it wishes to refer to those documents it does so in "terms, as you find it doing in s. 3, sub-s. 3." With all respect to the learned judge, I cannot attach the weight that he did to this circumstance. The scope of the two sub-sections is quite different. Sub-section 3 of s. 3 is a procedural section, directing that any order made under the Act is to be annexed to something. Obviously it has to go on to say, to what it is to be annexed. It was to be annexed to whichever of the relevant documents was the one material in the case. These would be probate in the one case or letters of administration with the will annexed in the other. Therefore the legislature could not help referring specifically to those two documents in that sub-section. Nothing of the kind was necessary in s. 2, sub-s. 1; and therefore the fact that the legislature in sub-s. 3 of s. 3 did refer to those documents does not appear to me to carry the weight which the learned judge attached to it.

With the utmost deference to the view of the learned judge, I am of opinion that the appeal should be allowed. The point was taken, I may say, as a preliminary objection, and the learned judge accordingly did not deal with the substance of the application. The case will have to go back to the Chancery Division for it to be dealt with.

SOMERVELL L.J. I agree that this appeal should be allowed, and I desire to add nothing to what the Master of the Rolls has already said with regard to the general principles of construction which should guide the courts in dealing with a question of this kind. But I would like to state quite briefly the process of my reasoning in my effort to apply those principles to this particular subject-matter. The general scheme of this Act can be very shortly stated. It assumes that a man has died after making a will which does not make reasonable provision for the wife or husband or other dependants as set out in the Act. In those circumstances it entitles any one of those persons to apply to the court and it gives the court jurisdiction to make an order for such reasonable provision as it thinks fit out of the testator's net estate. That is the general scheme of the Act, and it is in the light of that scheme that the court has to construe the words of s. 2, sub-s. 1. The controversy turns on the word " representation " and it seems to me that, having regard to the subject-matter of the sub-section, which is to limit the period during which an application can be made, the " representation " there referred to is representation in respect of a will, the proof of which is the condition precedent to the court's jurisdiction to make an order. I base my conclusion in the present case less on the fact that, when the letters of administration were taken out, there was no will known to be in existence and that letters of administration were granted on the basis that the testator had died intestate—less, on the absence of the will at that initial date—than on the fact that that was not the date of the representation in respect of the will which the plaintiff is seeking to attack.

I agree with the Master of the Rolls in saying that the case we have to deal with is not the case of two wills, and that the present case has features which strengthen the argument in favour of the present appeal that will not exist if and when the case of two wills arises. But I think, though it is not necessary to decide it, that the construction of this Act and the reasons which have led me to my conclusion would probably cover the case of two wills. I agree that the appeal should be allowed.

EVERSHED L.J. I have come to the same conclusion, though I confess I have reached it by steps more uncertain than those of the Master of the Rolls and Somervell L.J. The question posed by s. 2, sub-s. 1, is whether, assuming, as the sub-section does, that there is an application before the court, the court can make an order on that particular application ? Now since there is to be assumed an application before the court, it necessarily follows that at that date there must be a testator, because unless there was a testator there could be nobody capable of making an application. The question then is, as regards the presumed application, was it made " within six months from " the date on which representation in regard to the testator's " estate " (that is, to the estate of the particular individual who, having been domiciled in England, died leaving any of the classes of person set out in s. 1 and leaving a will) was first taken out ? It seems to me that there is great force in the argument of Mr. Sparrow that having regard to the context and to the purpose of the sub-section these words lead in the present case to dismissal of the plaintiff's appeal, because representation to this testator's estate was first taken out too long ago. For my part, and for the reasons already indicated, I cannot attach to the two words "testator's estate" a sufficient significance to qualify what seems to me to be the natural meaning of the word "representation"; nor should I find sufficient significance alone in the circumstance that this Act is concerned only with testate persons. That is obviously true, the Act being designed, and designed only, to limit to a certain extent and in a defined way the power of persons to leave their property by will as they think fit. But I have been persuaded to a conclusion in conformity with the conclusions of the other members of the court by the words in the sub-section which immediately precede those that I have read. I refer to the words "an order shall not be made save on an application made "within six months." As has been pointed out, the sub-section is in its nature a limitation of some right and its form is remarkable: it does not state, as the sidenote would appear to indicate, that an application shall be made within a certain time, but limits the powers of the court to make orders save on certain applications. I have been persuaded that that must imply necessarily that there are a number of applications capable of coming before the court but that only upon some of them can orders be made; and in turn that seems to postulate that during the six months referred to it must have been possible to make an application. Once that stage is reached it seems then to follow that the "representation in "regard to the testator's estate" referred to is a representation, as Mr. Pennycuick put it, under the will or under the relevant will.

I have listened attentively to what Somervell L.J. has said as to this. Mr. Sparrow made the point that in answering this question we might inferentially have to answer the question how s. 2, sub-s. 1, operates when there are two wills one of which supersedes the other. I feel that there is much force in that, because if we say that this sub-section does not mean what the learned judge held to be its meaning, we ought prima facie at least to have a clear idea of what it does mean. There seems to me to be no escape from the conclusion that we are putting a gloss upon the words "representation in regard to the testator's "estate," and if the gloss is, "under the relevant will," that will cover the case of two wills. That case is not before us, and I think it would be wrong, as the Master of the Rolls has pointed out, to express a concluded opinion upon it, but I follow Somervell L.J. in saying that, as at present advised, I feel that the gloss that is being put on the words would be quite likely to cover some cases at any rate where there were two wills.

There is this further point on which I desire to make one observation. I have felt the force of the argument that the question of two wills is relevant to a consideration what was the intention of this Act having regard to the whole of its terms. I am not sure that I accept the argument that the learned judge first reached a conclusion on a point which was not before him and then based his conclusion on this point. It seems to me that the learned judge was considering what type of case the words of s. 2, sub-s. 1, were apt to cover, and that it was relevant to consider a case where there are two wills as well as that where there is an intestacy and a will.

However that may be, I have, for the reasons which I have briefly given, reached the conclusion that we are able to give effect to the proposition which the learned judge confessed he would like to accede to, though I feel we have necessarily added some gloss to the words and to that extent embarked upon judicial legislation. I agree in the circumstances that the appeal on this point should succeed.

Appeal dismissed on the first point and allowed on the second point.

Solicitors: *F. Duke & Sons; A. J. Adams & Adams, for R. L. Frank & Co., Truro; W. R. Perkins, for Nelson L. Mitchell, Southend-on-Sea; Henry Boustred & Sons.*

H. C. G.

VAISEY J.

1948 Nov. 29.

In re KRIS CRUISERS, LIMITED.

Company — Charge — Omission to register — Application for extension of time for registration—Form of order—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 101.

An order made under s. 101 of the Companies Act, 1948, extending the time within which registration of a charge may be effected should contain a proviso for the protection of secured—but not of unsecured—creditors, whose rights have accrued between the date of the charge and the date of the registration.

On an application under s. 101 of the Act, the evidence should explain the circumstances in which the omission to register the charge arose, and not merely state that it was due to inadvertence.

In re M. I. G. Trust, Ld. [1933] Ch. 542 followed. *In re Charles & Co., Ld.* [1935] W. N. 15 distinguished.

ADJOURNED SUMMONS.

On March 7, 1947, Kris Cruisers, Ld. executed two instruments of charge, ranking pari passu and charging all the assets of the company both present and future including uncalled capital. The former was created in favour of St. Margaret's Trading Co., Ld., to secure repayment of 6,190*l.* with interest at 5 per cent., and the latter in favour of D. L. L. Humphries and D. V. Humphries (executors of the will of H. W. Humphries (deceased)), to secure repayment of 3,450*l.* with interest at 5 per cent.

The charges were subject to a debenture dated December 5, 1942, created in favour of Lloyds Bank, Ld. On October 27, 1948, the bank obtained leave under the Courts (Emergency Powers) Act, 1943, to appoint a receiver and manager. No registration of the charges created in 1947 was ever effected. The chargees now applied under s. 101 of the Companies Act, 1948 (1), for an extension of time in which to register the charges on the ground that the omission was "accidental and due to "inadvertence." It was stated in the evidence that the solicitors concerned with the preparation of the charges thought that the secretary of Kris Cruisers, Ld., or their solicitors, had effected the registration. The secretary believed that the chargees' solicitors had registered them.

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(1) The Companies Act, 1948, s. 101: "The court, on being "satisfied that the omission to "register a charge within the time "required by this Act . . . . "was accidental, or due to inadvertence or to some other "sufficient cause, or is not of a "nature to prejudice the position "of creditors or shareholders of "the company, or that on other "grounds it is just and equitable "to grant relief, may, on the "application of the company or "any person interested and on such "terms and conditions as seem "to the court just and expedient, "order that the time for registration shall be extended . . . ."

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No winding-up order had been made and no resolution for winding-up had been passed by the company, and no petition had been presented, or notice given of any resolution, to wind up the company.

R. Hunt for the applicants. This is an application under s. 101 of the Companies Act, 1948 for an extension of time to register a charge, on the ground that the failure to register was due to inadvertence. The normal form of order on such an application contains a proviso for the protection of secured—but not of unsecured creditors. The form was first settled by Buckley J. in *In re Joplin Brewery Co., Ld.* (1) where, on the analogy of the Bills of Sale Act he made the order "without "prejudice to the rights of parties acquired prior" to the registration. The Court of Appeal in *In re Ehrmann Bros., Ld.* (2), said that the form did not protect unsecured creditors. There has, however, been some conflict of judicial opinion, whether the court should, in any case, take action to protect unsecured creditors. Buckley J. in *In re Cardiff's Workmen's Cottage Co., Ld.* (3) said that there might be cases in which the court ought to protect the interests of unsecured creditors. In *In re M. I. G. Trust, Ld.* (4) Romer L.J. differed from Buckley J. and said that the proviso should only protect secured creditors. The question only arose incidently in that case, and although the case was affirmed in the House of Lords, this question was not further discussed. On the other hand in *In re Charles & Co., Ld.* (5) Clauson J. made an order without prejudice to the rights of creditors. His Lordship indicated that the solvency or insolvency of the company was a matter to be considered. That case is distinguishable as notices had already been sent out convening a meeting to consider a resolution for winding-up. It is submitted that on the authorities the court should not have regard to the rights of unsecured creditors. [Counsel also referred to: *In re Bootle Cold Storage & Ice Co.* (6), *In re Spiral Globe, Ld.* (7), *In re I. C. Johnson & Co., Ld.* (8) and *In re S. Abrahams & Sons* (9).]

(1) [1902] 1 Ch. 79.
(2) [1906] 2 Ch. 697.
(3) [1906] 2 Ch. 627.
(4) [1933] Ch. 542, 570.
(5) [1935] W. N. 15.
(6) [1901] W. N. 54.
(7) [1902] 1 Ch. 296.
(8) [1902] 2 Ch. 101.
(9) [1902] 1 Ch. 695.

VAISEY J. In this, as in other cases which have come before me, I desire to call attention to the meagre character of the evidence filed in support of the application. In this case it seems to me to be just, and only just, sufficient to satisfy the provisions of the section. It is most important that the court should be fully informed as to the circumstances which gave rise to the omission to register within the proper time, and that the evidence should not, as is so often the case, merely state that the matter was accidental and due to inadvertence, without particularizing the reasons for the breach of the statutory requirements and the surrounding circumstances. People seem to be under the impression that if it is deposed that the omission was "due to inadvertence" the court is practically obliged to exercise the power, which I hold to be a discretionary power, under s. 101 of the Companies Act, 1948, replacing s. 85 of the Companies Act, 1929.

There has been some difference of judicial opinion on the principles upon which this discretionary power should be exercised, and there is no doubt that in the latest of the reported cases, *In re L. H. Charles & Co., Ld.* (1), Clauson J., indicated that the solvency or insolvency of the company was a matter to be taken into special consideration when applications of this description were brought before the court. But in my view that decision of a learned judge, whose experience in company matters was almost unequalled, is one which, I think, must be regarded as exceptional: for there, be it observed, notices convening a meeting to consider a resolution for voluntary winding-up had actually been sent out at the time when the matter came before the court for decision. In my judgment, that case and the order which was made in it must be considered as exceptional and not to be followed except possibly in a case where the facts are precisely identical.

The authority by which I consider myself bound is the decision of the Court of Appeal in *In re M. I. G. Trust, Ld.* (2). There was an appeal to the House of Lords where the judgment of the Court of Appeal was affirmed without, as I understand, anything being said in the speeches of the learned Lords which throws more light on the matter than appears in the report to which I have alluded. I propose to accept as accurate, and to follow, the observations made in that case by Romer L.J. After calling attention to the fact that Buckley J. in *In re Cardiff Workmen's Cottage Co., Ld.* (3) had suggested that

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(1) [1935] W. N. 15.

(2) [1933] Ch. 542, 570.

(3) [1906] 2 Ch. 627.

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provisions ought to be inserted at any rate in certain cases for the protection of unsecured creditors as such, Romer L.J. expressed, as I understand him, dissent from that proposition. For very many years it has been the practice to insert in orders of this character a traditional and well-settled form of proviso for the protection of persons whose rights accrued between the date of the charge and its actual registration where the period for registration has been extended; and there has been a good deal of judicial discussion on the precise effect of those words. I do not myself propose to add to that discussion. The protecting words will go into this order as they go into every similar order so far as my experience goes; and the effect of them is now, I think, a matter which is beyond discussion, at any rate in this court; that is to say, they are for the protection of persons to whom have accrued rights of property in the assets of a company and they do not extend to protect the inchoate or other rights of unsecured creditors as such. The position is certainly peculiar and, in some respects, anomalous. It has been pointed out that the absence of the charge on the register may possibly have induced people to give credit to the company, on the footing that the assets of the company were not subject to any registrable charge or mortgage.

The true view is, however, that there is a statutory right in the mortgagee or chargee to come to the court to be relieved of the consequences of his own negligence and lack of caution provided that the court is satisfied that the omission to register was not an omission with any fraudulent intention but was, in the words of the Act, "due to inadvertence or to some "other sufficient cause." Pausing there, I think that "some "other sufficient cause" are words which would be satisfied if it were proved that the secretary of a company had been wrongly advised by his solicitor or counsel that registration need not be sought. There are other possible circumstances to which those additional words added to the word "inadvertence" might apply. In the present case the inadvertence was due to an obvious mistake. The solicitors of the chargees thought that the secretary of the company had registered the charge, as he ought to have done, and the secretary of the company thought that the chargees had registered the charge, as they might have done, and between the two of them, each supposing the other had carried out the requirements of the section, they overlooked the fact that neither of them had done so. That seems to me to be inadvertence, inattention, carelessness, but very far

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removed from the kind of case in which this relief should be refused—a typical case of which would be obviously where there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public, to whom the registration of it would have given the appropriate notice.

I have hesitated in this matter because this section always seems to me to be a benevolent section in this sense, that it appears to give the mortgagee or the chargee a complete and unfettered opportunity for repentance and really to place him in the same position exactly as if he had been careful and not careless, diligent and not negligent. In the present case I propose to make an order in the usual form with the usual qualifying words, and (although I am satisfied in this case that the company is very far from solvent but the contrary), I think that the solvency or insolvency of the company is not a matter to which I need pay attention. For that I have the authority, if I understand what he said, of Romer L.J. in the case of *M. I. G. Trust, Ld.* (1), which I have cited. As I say, in this case I think the evidence goes just far enough. I hope that future applications of this kind will be supported by evidence much more carefully framed; otherwise, as I have already said in this court, I may find myself compelled to dismiss one of these applications supported merely by evidence copied out of a common form book which informs me that the omission was "due to inadvertence," without going into any particulars of the nature of the inadvertence and the excuses which can be offered for the negligence and omissions on the part of those whose duty it is to comply with the statutory requirements of registration.

There will be the usual order.

Application granted.

Solicitors: *J. A. & H. E. Farnfield.*

(1) [1933] Ch. 542, 570, 571.

I. G. R. M.

Followed. DOLLAR v. WINSTON [1950] 1 Ch. 236

SWANSON *v.* FORTON.

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Nov. 18, 19, 22; Dec. 10.

Lord Greene M.R., Somervell and Evershed L.JJ.

Landlord and tenant—Covenant not to assign without landlord's consent—Consent not to be unreasonably withheld—Landlord refuses leave to assign last twelve days of term—Landlord wishes to prevent proposed assignee from obtaining a tenancy protected by Rent Restriction Acts—Refusal reasonable.

A dwelling-house capable of coming within the scope of the Rent Restriction Acts was demised for a term expiring on August 31, 1947. The tenancy agreement contained a covenant by the tenant not to assign the premises without the landlord's previous consent which was "not to be unreasonably withheld in "the case of a respectable and responsible sub-tenant or assignee." The tenant, having himself gone out of possession of the premises, on July 29, 1947, applied to the landlord for leave to assign the premises to an assignee who was admittedly respectable and responsible. The landlord did not consent to the assignment on the ground that the assignee would, at the expiration of the contractual term, become a statutory tenant entitled to the protection of the Rent Restriction Acts. On August 19, 1947, when the contractual term had only twelve days to run, the tenant without the landlord's consent assigned the premises and the assignee went into possession before the determination of the contractual term. In this action the landlord claimed, inter alia, a declaration that the withholding of her consent to the assignment was not unreasonable. Roxburgh J. held, following the decision of *In re Swanson's Agreement* (1946) 176 L. T. 25, that the landlord's refusal was unreasonable. The landlord now appealed.

Held, allowing the appeal, that on the facts of this case the landlord's refusal was not unreasonable. The matters to be considered in deciding whether a landlord's refusal to an assignment is reasonable are not limited to matters which will arise during the currency of a lease. The delayed effect of the assignment on the position of the parties after the termination of the lease has to be considered.

Dicta of Evershed J. in *In re Swanson's Agreement* (1946) 176 L. T. 25 disapproved.

Lee v. *K. Carter, Ld.* [1949] 1 K. B. 85 followed.

APPEAL from Roxburgh J.

The appellant, Ivy Ethel Swanson, plaintiff in the action, was the owner of No. 3, Greenhalgh Walk, Hampstead Garden Suburb, a dwelling-house within the scope of the Rent Restriction Acts. By a tenancy agreement dated October 14, 1937, she demised the premises to the respondent Sidney Frank Forton the first defendant for a term of three years from October 1, 1937, and thereafter from month to month until determined by notice at a rent of 120*l.* a year. Clause 2 (*f*) of the agreement contained an undertaking by the tenant not to assign, underlet, or part with possession of the premises or any part thereof without the landlord's previous consent in writing "such consent not to be unreasonably withheld in the "case of a respectable and responsible sub-tenant or assignee."

By a second tenancy agreement, dated July 20, 1945, the landlord let the premises to the respondent for a further term which it was agreed expired on August 31, 1947, at a rent of 160*l*. payable in advance, and it was thereby provided that the terms and conditions of the first agreement were included therein so far as they were not inconsistent with the terms thereof. Accordingly, the undertaking by the tenant not to assign or sublet was imported into the second agreement.

The respondent had not himself been in occupation of the premises for a considerable period but he had sublet them furnished, with the appellant's consent, to a Mrs. Marcuse. On July 29, 1947, his solicitors wrote to the appellant asking for a licence to assign to the second defendant Horace Edelman. He did not wait the result of that application but on August 12, the appellant's solicitors were informed on the telephone that the respondent was proposing to make the assignment without waiting for a licence. On August 19, 1947, when the contractual tenancy had only twelve days to run, the respondent by deed assigned the premises to the second defendant for the residue of the term vested in him without having first obtained the appellant's consent. No purchase price was expressed in that assignment but the second defendant gave the usual covenant to pay the rent (which had in fact been paid in advance) and to observe the covenants and conditions of the tenancy and to indemnify the respondent in respect thereof. Mrs. Marcuse having gone out of possession, the second defendant went into possession before the contractual tenancy came to an end.

On October 2, 1947, the appellant issued her writ against the two defendants. In her statement of claim she alleged that the assignment was in breach of the tenancy agreement, that the respondent had failed to deliver up possession on August 31, 1947, and that the second defendant remained in wrongful occupation of the premises. She claimed a declaration that the assignment was void and of no effect and not binding upon her; a declaration that her refusal of consent to the assignment was not unreasonable; possession of the premises and damages.

Before the commencement of the proceedings no such notice was served by the appellant as is mentioned in s. 146, sub-s. 1, of the Law of Property Act, 1925. Roxburgh J. ruled that the action, in so far as it claimed forfeiture on the ground of breach of covenant, was incompetent by reason of non-compliance with s. 146, sub-s. 1. Against this ruling there was no appeal, with the result that the tenancy was not determined by any effective election to forfeit before the expiration of the contractual term. On this basis the assignment to the second defendant was admittedly effective to vest the residue of the term in him notwithstanding the alleged breach of the undertaking not to assign: with the result that on the expiration of the contractual term the second defendant was in occupation and therefore entitled to claim the benefit of the Rent Restriction Acts. Effect was given to this in the judgment of Roxburgh J. by dismissing the action against the second defendant.

Against that part of the order there was no appeal and the only matter that remained was the appellant's claim against the respondent for a declaration that her refusal or withholding of consent was not unreasonable, and for damages for breach of the undertaking not to assign. These claims Roxburgh J. dismissed, holding for the reasons (with which he agreed) given by Evershed J. in *In re Swanson's Agreement* (1), that the withholding of consent was unreasonable. Against this part of the judgment the appellant appealed. It was agreed by counsel for the parties that in the event of the court holding that the withholding of consent was not unreasonable they should assess the damages.

S. H. Noakes for the appellant. Since the tenant was not residing at the premises and the sub-tenancy was furnished the landlord would have been entitled to possession at the termination of the tenancy agreement. Neither the tenant nor his sub-tenant would have been entitled to protection from eviction by reason of the Rent Acts (*Prout* v. *Hunter* (2)). The landlord's claim to possession could only have been defeated if the tenant had gone back into residence. All the evidence in this case shows a contrary intention. The tenant had been away from the house for some years, and his application for consent to the assignment shows that he had no wish to return. The tenant is, in effect, seeking to assign something which he cannot do in law, namely, the right to a statutory

(1) (1946) 176 L. T. 25.

(2) [1924] 2 K. B. 736.

tenancy. The assignment is only a device to defeat the landlord's right to possession at the end of the term. This distinguishes the present case from *Bates* v. *Donaldson* (1) and *Houlder Bros. & Co., Ld.* v. *Gibbs* (2) where the landlord was seeking to use his refusal of consent to assignment in order to gain some advantage during the term. The principles laid down in those cases are not rigid, and doubts as to their universal application have already been cast by two members of the House of Lords in *Tredegar* v. *Harwood* (3). The present case is more analogous to the recent decision of the Court of Appeal in *Lee* v. *K. Carter, Ld.* (4), where a change in the legal character of the tenant was held to be a reasonable ground for withholding consent. Here, instead of a non-protected tenant, the landlord has one who is protected. The facts in *In re Swanson's Agreement* (5) were different and the observations of Evershed J. were obiter. Not having served a notice under s. 146 of the Law of Property Act, the appellant cannot claim possession. The appellant is, however, entitled to at least nominal damages.

A. de W. Mulligan for the respondent. The respondent might have returned to occupy the premises himself. If he had done so, he would have become a statutory tenant. Accordingly, when the lease was granted the parties must have contemplated the fact that the respondent might become a statutory tenant. The question whether a landlord has unreasonably withheld his consent to an assignment must be determined by reference to the state of the facts at the time when the licence to assign was asked for. In the case of every tenancy of premises to which the Rent Restriction Acts apply there is an implied term that at the expiration of the tenancy the tenant may continue as a statutory tenant. The appellant is in no worse position because the assignee has become a statutory tenant. [He referred to *Parker* v. *Boggon* (6).] It is not reasonable for a landlord to refuse his consent on the ground that by giving his consent he will enable a person to be let into possession whom the landlord will not be able to get out at the end of the contractual tenancy. In *Lee* v. *K. Carter, Ld.* (4) the tenant was a company which could never have claimed the protection of the Rent Restriction Acts. That case is distinguishable from this, where the respondent might himself have claimed that protection. There is no distinction in principle between the case where a landlord refuses his consent to the assignment because he wishes to get possession during the currency of the term and that where he refuses because he wishes to get possession at its end. This case turns on the construction of the tenancy agreement. The agreement contemplates that a tenant may assign. If the appellant could refuse consent to an assignment on the ground that the assignee would claim the benefit of the Rent Restriction Acts, he could refuse his consent to every assignment other than an assignment to a company. If it is reasonable to refuse consent fourteen days before the end of the term it is equally reasonable to do so six months before. If that argument is wrong it is admitted that the appellant is entitled to nominal damages.

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(1) [1896] 2 Q. B. 241.
(2) [1925] Ch. 575.
(3) [1929] A. C. 72.
(4) [1949] 1 K. B. 85.
(5) 176 L. T. 25.
(6) [1947] K. B. 346, 348.

Cur. adv. vult.

Dec. 10, 1948. LORD GREENE M.R., read the following judgment. He stated the facts and continued:

From these facts and the fact of the assignment itself, which was made when the contractual tenancy had only twelve days to run, the only reasonable inference to be drawn was that the respondent had no intention of resuming occupation of the house so as himself to be able to claim the protection of the Acts when the contractual tenancy came to an end: and from that fact, coupled with the fact that the rent was payable in advance and had been paid down to the end of the term, the only reasonable inference to be drawn was that the assignment was made for the sole purpose of enabling the assignee to claim the protection of the Acts which the respondent could not himself have claimed, since he had no intention of returning to occupy the house. I would have said that that inference was the only reasonable one to draw on the admitted facts, even if counsel for the respondent had not refrained from disputing it. The respondent did not give evidence at the trial: this was no doubt because Roxburgh J. dismissed the action without calling on counsel for the respondent. We asked counsel whether, assuming we thought there was a case for him to answer, he wished to call any evidence, and he informed us that he did not.

This, therefore, was the position as between the appellant and the respondent when the application for consent to the assignment was made. Unless an effective assignment of the remaining days of the term could be made the appellant would be entitled to recover possession of her house on the expiration of the term in accordance with the terms of the tenancy agreement. She was anxious to do so in order to be in a position to let it to a tenant of her choice. She had a long waiting list of persons anxious to take one of her houses (of which she owned a number) and she wanted to be fair to them. She apparently had no intention at the time of selling the house with vacant possession on the termination of the tenancy. On the other hand, if the respondent could obtain the consent of the appellant to an assignment, he would be in a position to introduce a tenant of his own choice, not merely for the residue of the contractual term but also for the duration of the statutory tenancy which would automatically come into existence in favour of the assignee as the tenant in occupation on the termination of the contractual tenancy.

Apart from authority and construing the undertaking in its natural meaning in relation to the facts which I have stated, I should have had no hesitation in saying that the appellant was not acting unreasonably in withholding her consent to the assignment. Under the contract the respondent had only twelve days of the term to assign. What he was attempting to do was not merely to assign the twelve days but to put his assignee in a position to obtain what he himself could not obtain, namely an extension of the right to occupy lasting beyond the expiration of the contractual term. If he himself had, contrary to his intention, returned to occupy the house so as to become a statutory tenant, he could not have assigned his statutory tenancy. By taking advantage of the fact that the contractual tenancy had twelve days to run he is attempting to do what for all practical purposes (but not, of course, in law) is the same thing.

One suggestion I may dispose of at the outset. It was that in some way the withholding of consent to assign would in the circumstances be a violation of the spirit of the Rent Restriction Acts. This argument involves a petitio principii. There is nothing in the Acts which restricts a lessor's right under the contract to withhold his consent. The lessee can only put his assignee into a position to become a statutory tenant if he can lawfully do so ; whether he can or cannot lawfully do so depends on the unreasonableness or the reasonableness of the lessor's refusal. To say that it is unreasonable for the lessor to refuse his consent because it would prevent the lessee doing something which he can only do if the refusal is unreasonable is to beg the question.

The main argument on behalf of the respondent is based on the judgment of this court in *Bates* v. *Donaldson* (1). In that case the views of A. L. Smith L.J. were expressed in a way more restrictive of the lessor's rights than those of Kay L.J. Lord Esher M.R. agreed with both. A. L. Smith L.J. said (2): "It is not, in my opinion, the true reading of this clause that "the permission can be withheld in order to enable the lessor "to regain possession of the premises before the termination "of the term. It was in my judgment inserted alio intuitu "altogether, and in order to protect the lessor from having his "premises used or occupied in an undesirable way or by an "undesirable tenant or assignee, and not in order to enable the "lessor to, if possible, coerce a tenant to surrender the lease "so that the lessor might obtain possession of the premises, "which was the reason why in the present case the assent was "withheld." The facts in that case were very different from those in the present case. The object of the lessor in withholding consent was to recover possession before the end of the term, and it was on this ground that he lost the case. In *Houlder Bros. & Co., Ld.* v. *Gibbs* (3) Tomlin J., following what he took to be the view of A. L. Smith L.J., held that the only circumstances relevant to consider on the question of reasonableness were matters affecting "the personality of the "lessee or the nature of the user or occupation of the premises." There, the lessor's object was to avoid the loss of a good tenant of adjoining premises which he owned because it was apprehended that, if the assignment was allowed, the assignee who was in fact the tenant of the adjoining premises would give up his tenancy of them and move into the premises proposed to be assigned to him.

This decision was affirmed by this court (4) but it was subjected to criticism in the House of Lords in the later case of *Tredegar* v. *Harwood* (5), on the ground that it involved adding glosses to the plain words of the covenant. As a decision, however, it is, just as *Bates* v. *Donaldson* (1) itself, binding upon this court. It was, however, carried a step further by some observations of Evershed J. (as he then was) which were approved by Roxburgh J. in the present case. Those observa-

(1) [1896] 2 Q. B. 241.
(2) Ibid. 247.
(3) [1925] Ch. 198, 209.
(4) [1925] Ch. 575.
(5) [1929] A. C. 72.

tions were, in fact, made obiter as the decision was based on other grounds. The case (*In re Swanson's Agreement* (1)) was one in which Evershed J. held that the contractual tenancy had come to an end, so that no assignment was possible. I shall return to this case presently. Subsequently to the judgment of Roxburgh J. in the present case, namely, on July 22, 1948, the case of *Lee* v. *K. Carter, Ld.* (2) was decided by this court. There, the lessee was a limited company, and, being such, was not capable of becoming a statutory tenant. Towards the end of the tenancy the company asked the landlord for his consent to an assignment to one of its directors and, on the landlord refusing it, nevertheless made the assignment. The object of the landlord in refusing his consent was to prevent a statutory tenancy arising at the termination of the contractual tenancy. It was held that his refusal was not unreasonable. The court examined the decisions in *Houlder Bros. & Co., Ld.* v. *Gibbs* (3) and *Tredegar* v. *Harwood* (4) and the dicta of Evershed J. in *In re Swanson's Agreement* (1). Tucker L.J. (5), after pointing out that those dicta were obiter and that, assuming the contractual tenancy there to have been subsisting, the proposed assignor was a person who, if he had remained tenant, would have become a statutory tenant at the termination of the agreement, explained the dicta of Evershed J. as being based on the view that the landlord's real objection to the assignment was that he would "have "been thereby deprived of his opportunity of getting possession "of the premises *before the expiration of the lease* and therefore "the case would have been almost identical with *Bates* v. *Donaldson* (6)," and if the dicta went beyond that and were inconsistent with the view taken by himself in the then instant case he would differ from them.

Now, in *In re Swanson's Agreement* (1) the tenant was actually in occupation at the time of the assignment and all that he had to do was to remain in occupation until the lease came to an end for a statutory tenancy to come into existence. The present case is quite different for its basis in fact is that the tenant was not in occupation, was residing elsewhere and had no intention of returning to the house. The only way, therefore as I have pointed out, that a statutory tenancy could be brought into existence was by the device of an assignment.

(1) 176 L. T. 25.
(2) [1949] 1 K. B. 85.
(3) [1925] Ch. 198, 575.
(4) [1929] A. C. 72.
(5) [1949] 1 K. B. 85, 96.
(6) [1896] 2 Q. B. 241.

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This case is, however, different from that of *Lee* v. *K. Carter, Ld.* (1) in that the tenant there was a limited company whereas here the tenant is an individual. But on the facts of this case I do not think that this makes any difference. In this case on the facts, as in that on the law, the only method of bringing a statutory tenancy into existence was by the device of an assignment; and it does not appear to me to matter that in *Lee's* case (1) the reason why, in the absence of an assignment, no statutory tenancy could arise was one of law, whereas in the present case the position is that on the inference which the landlord was entitled to make, no statutory tenancy was, in the absence of an assignment, going to arise in fact.

In his judgment Evershed J. had used the following words (2): " . . . . it is, I think, plain from the terms of the judgment of " Tomlin J., and of the judgment of the Court of Appeal that " by ' user or occupation ' is meant the manner in which the " premises are used or occupied—for example, for purposes " which might cause offence even although they did not involve " any breach of covenant . . . ." If I may respectfully say so, this appears to me to be adding yet another gloss on the plain language of the undertaking and to go farther even than Tomlin J. had gone and farther than *Bates* v. *Donaldson* (3). I find in the judgment of Tucker L.J. in *Lee's* case two passages of great assistance. The first, is as follows (4): " Once again it is necessary, I think, to emphasize that that " language must be considered in the light of the facts of the " particular case with which the learned judge was dealing. " I do not think for one moment that Tomlin J. was purporting " to lay down some principle of universal application which " would cover every conceivable case, and it is abundantly " clear that he had not in his mind any such situation as that " which has arisen here, in relation to the results which " might follow at the end of a lease from the acceptance " of a particular assignee." The second is where, speaking of the case before him, he said (5): " It is true that " the consequences would not show themselves until the " expiration of three months from the date of the assignment, " and counsel for the tenants is right when he says that the " contractual relationship would be the same had the landlord " consented to the assignment, but none the less it was a

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(1) [1949] 1 K. B. 85.

(2) 176 L. T. 25.

(3) [1896] 2 Q. B. 241.

(4) [1949] 1 K. B. 85, 94.

(5) Ibid. 96.

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"contractual relationship pregnant with future possibilities, "or more than possibilities, which would not have resulted "from the previous existing contractual relationship between "the landlord and the company." These words appear to me to apply mutatis mutandis to the circumstances of the present case and I must respectfully disagree with the opinion expressed by Evershed J. in the passage quoted. I see no reason for limiting the matters to be considered in regard to reasonableness to matters which will arise during the currency of the lease. It is the effect of the assignment as leading inevitably to the extension of the right of occupation beyond the expiration of the contractual term that is here objected to. The assignment would lead, in Tucker L.J.'s words, to "a "contractual relationship pregnant with future possibilities." I can see no reason and I find no authority which leads me to think that in these circumstances the landlord's refusal was unreasonable. Apart from *Lee's* case (1), there is no case binding on this court in which the delayed effect of an assignment on the position of the parties after the termination of the lease has been considered.

Nothing that I have said must be taken as applying to a case of what in the argument was sometimes referred to as "normal" assignment. If that phraseology be adopted, the whole basis of fact in the present case is that the assignment proposed was an "abnormal" one in that it was an assignment of the tail end of the term by the lessee not for the purpose of conferring the right to occupy for the few remaining days of the term, but in order to enable the assignee to occupy thereafter under the Rent Restriction Acts. In my opinion therefore the appellant's withholding of consent was not unreasonable.

The only remaining question is one of damages. It was admitted in evidence at the trial that the appellant had suffered and would suffer no pecuniary damages from the assignment. The assignee is respectable and responsible, and no rent higher than the standard rent (with any permissible additions) could have been obtained from another tenant. The appellant had no intention of selling the house. In the circumstances I do not see how she can claim more than nominal damages. I would award her 40s. for this. The appeal is accordingly allowed. The appellant will have a declaration that her withholding of consent was not unreasonable and judgment for 40s. damages.

(1) [1949] 1 K. B. 85.

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SOMERVELL L.J. I agree with the judgment delivered by the Master of the Rolls and have nothing that I wish to add.

EVERSHED L.J. I agree. It is plain, since the judgment of this court in *Lee* v. *K. Carter, Ld.* (1), that in the earlier case of *In re Swanson's Agreement* (2) I used language in reference to the decision of Tomlin J. in *Houlder Bros. & Co., Ld.* v. *Gibbs* (3) which went further than was justified by Tomlin J.'s judgment, and particular by his formula "user or "occupation."

It could not be suggested to be right that a landlord may always reasonably refuse his consent to an assignment (or an underlease) merely because his chances of dominion over his property at the end of the lease might thereby be enhanced or the chances of a continued right of personal occupation after the end of the term might be thereby diminished: for otherwise a landlord would in effect be justified in refusing his consent at any time to any assignment or any underletting of "rent restricted" premises.

But the facts of the present case are wholly exceptional. For reasons fully stated by the Master of the Rolls it is in this case obvious that the assignment of the "fag-end" of the term was intended to relate in its effect not really at all to the contractual term but only to the period after the end of the term. Save in relation to what should follow after the term expired, the last twelve days of the term were without significance to assignor or assignee.

In these circumstances I think the present case is in essence the same as that of *Lee* v. *K. Carter, Ld.* (1), and that a similar conclusion should follow.

Appeal allowed.

Solicitors: *Barfield & Barfield; F. Bernard Smith.*

(1) [1949] 1 K. B. 85.
(2) (1946) 176 L. T. 25.
(3) [1925] Ch. 198.

B. A. B.

JENKINS J.

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Oct. 29; Nov. 11.

In re GEORGE'S WILL TRUSTS.

BARCLAY'S BANK, LIMITED *v.* GEORGE.

Will—Rule against double portions—Provision in will for son to take over testator's farms and live and dead stock—Intervention of War Agricultural Committee—Consequential gift to son inter vivos of live and dead stock—Whether rule applicable.

The testator, a farmer, by his will made in 1940 left one-third of his residue to his son R., a bank employee, and two-thirds to his son E. who assisted him in farming. The will further provided that if E. within one month of the testator's death notified the trustees of his wish to carry on the farm, the residuary estate was to be valued, that one-third of such valuation should constitute the share of R. and two-thirds the share of E., and that R. should allow his share to remain invested in the farm for three years. The testator, owing to advanced age, allowed his land to get into poor condition, with the result that the War Agricultural Executive Committee served him with a notice to vacate his farms in 1941. This notice was withdrawn on an arrangement being made, and subsequently carried out, whereby the testator made a gift of his live and dead stock and transferred his farms to E. who took over the lease of the testator's leasehold farm and took a lease from the testator of his freehold farm. The live and dead stock was valued at 2,060*l.*, and E. took over the farm bank account which was overdrawn in the sum of 151*l.* The testator died in 1942. Upon a summons being taken out to determine whether or not the rule against double portions applied to the gift of live and dead stock to E.:—

Held, that the gift was a portion, and that the rule applied (*In re Vaux* [1939] Ch. 465 and *In re Lacon* [1891] 2 Ch. 482 considered) as

(i.) the gift by its nature would be regarded as a portion unless circumstances showed the contrary. *Taylor* v. *Taylor* (1875) L. R. 20 Eq. 155 applied;

(ii.) although the presumption against double portions could be rebutted if the gift and the provision in the will were not ejusdem generis, this proposition had no application where the portion was valued at the time of advancement;

In re Tussaud's Estate (1878) 9 Ch. D. 363, and *In re Jaques* [1903] 1 Ch. 267 considered and applied;

(iii.) in any case the gift was sufficiently ejusdem generis with the option conferred by the will to exclude such a proposition;

(iv.) the liabilities assumed by E. under the leases were balanced by a fair quid pro quo and did not affect the quality of the gift. *In re Vickers* (1888) 37 Ch. D. 525, at p. 535 considered; and

(v.) the circumstances which led to the gift reinforced the presumption, as the transaction operated as an anticipation of the testator's demise, by putting E. into immediate possession of his intended inheritance.

In re Scott [1903] 1 Ch. 1 distinguished.

Held, also, that E. should receive credit for the amount of the overdraft.

ADJOURNED SUMMONS.

The facts and arguments are fully set out in the judgment.

Harold Lightman for the plaintiff trustees.

J. A. Plowman for the first defendant, Ernest George.

Ian G. H. Campbell for the second defendant, Robert George.

Cur. adv. vult.

Nov. 11. JENKINS J. The testator in this case was a farmer. He had two sons, the defendants Augustine Ernest Maltus George and Robert Ormuz George, whom I will call "Ernest" and "Robert" respectively. At the date of his will the testator was farming two properties at Farthinghoe in Northamptonshire, namely, the Glebe Farm, which was his own freehold, and the Laurels Farm, which was held under a tenancy agreement in the joint names of himself and Ernest. It appears that Ernest had all his working life been employed in the testator's farming business, while Robert had for many years been employed at a branch of Barclays Bank, Ld. The question which I have to decide is in substance whether a gift of the live and dead stock on the two farms made by the testator to Ernest after the date of his will should be brought into account by Ernest in the division of the testator's residuary estate between Ernest and Robert, under the rule commonly called the rule against double portions.

By his will dated July 22, 1940 (so far as material for the present purpose) the testator appointed the plaintiffs, Barclays Bank, Ld. and James Black, to be executors and trustees thereof and after making various pecuniary and specific gifts by cl. 6 devised and bequeathed his residuary real and personal estate to his trustees upon trusts of the usual character for sale, calling in and conversion and payment of his funeral and testamentary expenses and debts, and to stand possessed of the net residue to pay one-third thereof to Robert for his sole use and benefit absolutely and to pay the other two-thirds thereof to Ernest for his sole use and benefit absolutely, and by cl. 7 gave the following directions which I will read in full: "If the said Augustine Ernest Maltus George shall within "one month from the date of my death give notice to my "trustees in writing that he desires to carry on my farm at "Farthinghoe aforesaid then I direct my trustees to cause "a valuation to be taken of my residuary estate and I direct "that one-third of such valuation shall be deemed to constitute "the share of the said Robert Ormuz George in my residuary "estate and that two-thirds of such valuation shall be deemed "to constitute the share of the said Augustine Ernest Maltus "George in my residuary estate and I further direct that in the "event of the said Augustine Ernest Maltus George carrying "on my said farm under the provisions of this clause then the "said Robert Ormuz George shall allow his one-third share "of my residuary estate to remain invested in my said farm "for the benefit of the said Augustine Ernest Maltus George "and such one-third share shall be secured to the said Robert "Ormuz George by means of a suitable charge on the farm "stock or otherwise and the said Augustine Ernest Maltus "George shall pay the said Robert Ormuz George interest at "five per cent. per annum on the value of the one-third share "of the said Robert Ormuz George in my residuary estate. "And I further direct that the said Robert Ormuz George shall "allow his one-third share to remain invested in the said farm "for a minimum period of three years computed from the date "of my death and that after the expiration of such period of "three years the said Robert Ormuz George shall be at liberty "at any time thereafter to demand repayment to him by the "said Augustine Ernest Maltus George of the value of such "one-third share and such value shall be reckoned as the value "of such one-third share as at the date of the valuation taken "by my trustees as aforesaid Provided always that the said "Augustine Ernest Maltus George shall be at liberty at any "time during the period of three years hereinbefore mentioned "to pay to the said Robert Ormuz George the value of such "one-third share reckoned as set out above together with "interest to the date of such payment and in such event the "said Augustine Ernest Maltus George shall be entitled to have "such charge or such other security hereinbefore mentioned "duly discharged." The testator died on September 4, 1942, aged eighty-three and his will was duly proved by the plaintiffs on April 23, 1943.

The circumstances in which the testator between the date of his will and the date of his death made the gift to Ernest to which the question now before me relates are as follows.

The substance of the evidence is that by the end of 1940 the two farms were in very poor condition primarily owing to the testator's determination, notwithstanding his age, to keep the management of them in his own hands, which made it impossible for Ernest to do anything effective to improve the position; that owing to the unsatisfactory state of the farms the County War Agricultural Committee in 1940 threatened the testator with ejection from them under the powers conferred on the committee by the emergency legislation then in force, and early in 1941 actually caused notices to be served upon him requiring him to vacate both farms; that after the service of these notices the testator and Ernest had an interview with the secretary to the committee, who told them that unless the farms were thoroughly reorganized the notices would be enforced; and that at this interview the suggestion was made (I infer it was made by the secretary) that it was time the testator retired from active farming and handed over control of the farms to Ernest. After the interview with the secretary of the War Agricultural Committee the testator consulted his solicitors, Messrs. Barnes and Lanham, and after a conference between Mr. Lanham of that firm, the testator, Ernest, and the late Mr. Harry Percy Stace, a valuer employed by the testator, the following scheme was drawn up for the purpose of satisfying the committee that there was to be a complete change in the control of the farms and of persuading the committee to withdraw their notices: (i.) the testator was to make a gift of all the live and dead stock on the two farms to Ernest, such gift to be evidenced by a formal deed of gift. (ii.) The testator was to assign to Ernest his share in the tenancy of the Laurels Farm. (iii.) The testator was to grant to Ernest a tenancy of the Glebe Farm at a rent to be agreed between them and their valuer as a fair rent. (iv.) The testator was to make arrangements with his bank to secure adequate financial resources to enable Ernest to finance the farms until such time as he could do without this assistance. This scheme met with the approval of the War Agricultural Committee, whose concern was to see that the farms were effectively placed under Ernest's management in the interests of efficiency, and documents to carry it out were in due course prepared, with a view to Ernest's assuming control of the farms on March 25, 1941. Ernest did in fact take control of the farms, and possession of the live and dead stock, on or about that date, but largely owing to delays on the part of the testator the documents, namely, the assignment to Ernest of the testator's interest in the tenancy of the Laurels Farm, the tenancy agreement by which the Glebe Farm was let to Ernest, and the deed of gift, were not executed until August 25, 1941. The deed of gift was, it appears, never stamped, the original was not produced, and no admissible evidence of it was adduced before me. However it was not in dispute that the gift of the live and dead stock was in fact made and that Ernest had assumed possession under such gift some five months before the date on which the deed of gift is said to have been executed. The live and dead stock was valued at the time of the gift by Mr. Stace at 2,060*l.* 17*s.* 3*d.*, his valuation being dated March 28, 1941. The rent reserved to the testator on the letting of Glebe Farm to Ernest was 172*l.* per annum. It was not suggested before me that this was anything more or less than a fair rent for the property let. Indeed, I assume it to have been the fair rent fixed in consultation with the valuer as contemplated by the scheme. The testator's bank account was overdrawn on March 25, 1941, to the extent of 151*l.* 17*s.* 3*d.* This account was continued for the purposes of the farms with the result that the overdraft had by August, 1942, been converted into a credit balance of 529*l.* 3*s.* 7*d.* It was not disputed before me that the payments-in which produced this result could be regarded as wholly attributable to Ernest's farming operations. On August 21, 1942, this credit balance was transferred by the testator to an account in Ernest's name. It appears that after the testator's death Ernest duly gave notice to the testator's trustees of his desire "to carry on the testator's farm at Farthinghoe" pursuant to cl. 7 of the will thus bringing the provisions of that clause into operation. It further appears that after the testator's death Ernest, on April 6, 1943, surrendered his tenancy of the Laurels Farm and on so doing became liable to a claim of 545*l.* or thereabouts for dilapidations as against which he had a claim of 500*l.* or thereabouts for the tenant right. I do not think this surrender and its financial consequences to Ernest have any bearing on the question I have to decide.

I may now proceed to consider whether on the facts and in the circumstances which I have stated the rule against double portions applies to the gift of live and dead stock to Ernest, or perhaps more accurately whether there is anything in those facts and circumstances to exclude the application of the rule. The principles on which the rule is based and applied are succinctly stated by Lord Greene M.R. in *In re Vaux* (1),

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(1) [1939] Ch. 465, 481.

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where he says: "The rule against double portions rests upon "two hypotheses: first of all, that under the will the testator "has provided a portion and, secondly, that by the gift inter "vivos which is said to operate in ademption of that portion "either wholly or pro tanto, he has again conferred a portion. "The conception is that the testator having in his will given to "his children that portion of the estate which he decides to "give to them, when after making his will he confers upon a "child a gift of such a nature as to amount to a portion, then "he is not to be presumed to have intended that that child "should have both, the gift inter vivos being taken as being "on account of the portion given by the will. When the word "'portion' is used in reference to the gift inter vivos, it has a "qualitative significance, in this sense, that it is not every "gift inter vivos that will cause the rule to come into operation. "If a testator gives to a child as pure bounty and by way "merely of a present a sum of money, that will not have the "character to cause the rule to come into operation. Similarly "there may be various reasons why the testator should give "property to a child. He may wish to free him from some "embarrassment, or something of that kind. In cases of that "sort upon the facts a gift may not be a portion at all, in which "case, of course, the rule does not apply." As appears from that passage and also from *In re Lacon* (1) (particularly in the judgment of Bowen L.J.) the first matter which must be made out is that both the gift by will and the gift inter vivos made by the testator to his child are gifts in the nature of portions. Once that essential condition is established, a presumption arises that the testator intended the provision inter vivos to be on account of the provision by will, but the presumption may be rebutted if the circumstances in which the gift inter vivos was made are such as to show that the testator did not intend the provision inter vivos to be on account of the provision by will.

It was not disputed before me that the provision made for Ernest by the testator's will in the present case was in the nature of a portion; it was, however, contended on his behalf that having regard to its character and the circumstances in which it was made the testator's gift inter vivos of the farming stock to Ernest was not in the nature of a portion at all, and alternatively that if this gift was in itself in the nature of a portion its character and the circumstances in which it was made

(1) [1891] 2 Ch. 482, 497, 499.

were sufficient to rebut the presumption. The question of portion or no portion being necessarily to a great extent a question of the testator's intention, it is hardly possible to distinguish circumstances relied on as tending to show that the gift inter vivos was not in the nature of a portion at all from circumstances relied on as tending to rebut the presumption on the footing that it was in itself in the nature of a portion, and I do not propose to do so. First, as to the character of the gift of live and dead stock. I have no doubt that a gift by a farmer to his son of live and dead stock with which to set up in business as a farmer may be in the nature of a portion, and in the absence of circumstances tending to show the contrary would generally be regarded as such. In *Taylor* v. *Taylor* (1), Jessel M.R., mentioned the buying of the goodwill of a business for a son and giving him stock in trade as a typical instance of a portion. It was, however, contended that the difference in the character of the gift of live and dead stock from the provision made for Ernest in the present case was such as to rebut the presumption against double portions even if the circumstances were otherwise such as to raise it at all. Reference was made in this connexion to *In re Tussaud's Estate* (2) and *In re Jaques* (3). The latter case is no doubt clear authority for the proposition stated in the headnote "that the presumption against double portions will not prevail "where the testamentary portion and subsequent advance-"ment are not ejusdem generis," but the judgments of the Court of Appeal, as I understand them, further show that the proposition thus stated has no application where the "subse-"quent advancement" though not ejusdem generis with the testamentary provision is one on which a money value was set at the time it was made. In the present case I think that, having regard to the fact that the testator's live and dead stock formed part of the assets which Ernest was to take in specie under the will in the event of his exercising the option under cl. 7, the gift inter vivos here was sufficiently ejusdem generis with the testamentary provision to prevent the exclusion or rebuttal of the presumption by reason of the difference in character between the two gifts. If I am wrong in that view, I think that in any case the difference in character is rendered immaterial by the circumstance that the live and dead stock was valued at the time of the gift inter vivos at 2,060*l.* 17*s.* 3*d.*,

(1) (1875) L. R. 20 Eq. 155, 158.

(2) (1878) 9 Ch. D. 363.

(3) [1903] 1 Ch. 267.

and can therefore be regarded for the present purpose as a gift of so much money.

Next, it was said that if the transaction of which the gift of the live and dead stock formed part was viewed as a whole, it would be found in truth to be no gift at all but simply part of a transaction under which Ernest took over certain assets and assumed certain liabilities in the form of (i.) the testator's share of the rent and other liabilities under the tenancy of the Laurels Farm, (ii.) the rent payable and other liabilities incurred to the testator under the tenancy granted to Ernest of the Glebe Farm, and (iii.) the overdraft of 151*l.* 17*s.* 3*d.* I cannot accept this argument. I think Ernest must be regarded as receiving a fair quid pro quo, in the form of the testator's share of the Laurels tenancy and the tenancy of the Glebe Farm granted to him by the testator, for the liabilities in respect of rent, and so forth, which he undertook, and this is certainly the effect of the evidence. That leaves the whole of the 2,060*l.* worth of live and dead stock as pure gift, subject only to the question of the overdraft with which I will deal in a moment. It would to my mind be very strange if in a case where a father gave his son valuable live and dead stock, granting him at the same time a tenancy at a fair rent, of a farm on which to set up in business as a farmer, the son's liability for the rent would prevent the gift of the stock from being a gift, and, prima facie, a gift by way of portion. Further, I do not think the fact that a gift has an element of liability attached to it in itself prevents the gift from being a portion. It is rather " a matter to be taken " into consideration in considering what the value of the gift " was." See per North J. in *In re Vickers* (1), a passage in his judgment which was not, I think, included in the disapproval expressed by the Court of Appeal in *In re Jaques* (2).

Finally, it was urged that the testator's sole object here was not to benefit Ernest, but simply to placate the War Agricultural Committee. The testator did not want to make the farms over to Ernest or anyone else, but on the contrary was extremely reluctant to do so. He was forced to resign their management to somebody on pain of eviction, and entered into this transaction with Ernest merely to extricate himself from the difficulty in which he was placed and procure the withdrawal of the notices. Therefore, it is contended, the case is not one of portion at all, any more than a payment to meet a son's pressing debts is a portion, as to which see *In re Scott* (3).

(1) (1888) 37 Ch. D. 525, 535.

(2) [1903] 1 Ch. 267.

(3) [1903] 1 Ch. 1.

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I think this argument is a non sequitur. I am quite prepared to accept the assumption that but for the intervention of the committee the testator would have retained the farms with the live and dead stock upon them until he died, and only got rid of the farms and the stock under, in effect, the compulsion of the notices and the committee's insistence upon them. But why did he select Ernest as the recipient ? Ernest was under no pressing financial difficulties calling for extraordinary assistance such as would not, on the authorities, be regarded as in the nature of a portion. But Ernest was the testator's farmer son for whom the testator had made provision to the extent of two-thirds of his residuary estate with the option of taking the residue in specie (subject to a charge for Robert's one-third share to be quantified by means of a valuation of the whole) if he desired to carry on the testator's farm as (it is reasonable to suppose) the testator contemplated Ernest would in all probability wish to do. This is, I think, quite plainly the reason why Ernest was selected to take over the farms and receive the live and dead stock. Viewed in this light, I think the circumstances tend to reinforce rather than rebut the presumption. The testator being compelled to go out of farming and make provision for the future management of the farms to the satisfaction of the committee, did so by as it were anticipating his demise and putting Ernest in immediate beneficial possession of part of what he would in due course have taken under the testator's will. The attitude of the committee so far as I can see afforded no ground at all for increasing Ernest's provision at the expense of Robert, though it no doubt did afford good ground for putting Ernest into immediate possession of this part of the testamentary portion designed for him.

For these reasons I am of opinion that this is a case to which the rule against double portions applies with respect to the gift to Ernest of the live and dead stock.

It remains to consider the question of the overdraft. A claim originally made that the credit balance in the bank account at the date of its transfer to Ernest should be treated as a gift additional to the live and dead stock for the purposes of the rule was rightly abandoned, on the ground that the balance was made up of farming receipts subsequent to the gift of the live and dead stock, or, in other words, simply represented the fruits of the gift. The overdraft which existed at the date of the gift was discharged from the same source, and the value of

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the gift to Ernest was therefore pro tanto diminished. The precise arrangement (if any) come to about the overdraft at the time of the gift is not clear from the evidence, but there is no doubt it was in fact discharged in this way. I am therefore, I think, justified in holding (and counsel for Robert did not press the contrary view) that the overdraft should be treated as a liability subject to which Ernest took the gift of the live and dead stock and the tenancies of the farms.

In the result, therefore, I hold that the sum of 2,060*l.* 17*s.* 3*d.* (being the value of the live and dead stock at the date of the gift) less 151*l.* 17*s.* 3*d.* (being the amount of the overdraft at the same date) should be brought into account by Ernest in the ascertainment of the shares of the two sons in the testator's residuary estate. The costs of all parties as between solicitor and client will be borne by the testator's estate in due course of administration.

Declaration accordingly.

Solicitors for the plaintiffs: *Torr & Co. agents for Barnes & Lanham, Brackley.*

Solicitors for the Defendants: *Preston, Lane-Claypon and O'Kelly, agents for Walter R. J. Law & Sons, Buckingham and Brackley, and for Darby & Son, Oxford.*

F. R. D.

KAIN *v.* NORFOLK AND ANOTHER.

JENKINS J.

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Dec. 7, 8.

Easement—Right of way—Express grant—Construction—" With or " without horses, carts and agricultural machines and implements to " go, pass and repass "—Whether motor lorries included.

A conveyance made in 1919 of agricultural glebe land adjoining a rectory contained a grant to the purchaser, his assigns, etc., of the right " with or without horses carts and agricultural machines " and implements to go pass and repass " over a defined strip within the rectory grounds. A sand and gravel pit was later opened on the land conveyed, and the purchaser's licensees conveyed quantities of sand in motor lorries over the right of way. In an action brought by the vendor's successor in title and occupant of the rectory against the purchaser and his licensees, in which the plaintiff claimed that the grant did not extend to user of the way by motor lorries :—

Held, that the grant included the right of carting loads along the way, irrespective of the means of propulsion of the vehicles used.

White v. *Grand Hotel, Eastbourne, Ld.* [1913] 1 Ch. 113, and observations of Peterson J. in *A.-G.* v. *Hodgson* [1922] 2 Ch. 429, at p. 437, applied.

Cannon v. *Villars* (1878) 8 Ch. D. 415; *Taylor* v. *Goodwin* (1879) 4 Q. B. D. 228; *Danby* v. *Hunter* (1879) 5 Q. B. D. 20; *Hammond* v. *Prentice Bros., Ld.* [1920] 1 Ch. 201 and *Lock* v. *Abercester, Ld.* [1939] Ch. 861, referred to.

WITNESS ACTION.

On February 13, 1919, the rector of Bradwell, Essex, conveyed to the first defendant some 30 acres of agricultural glebe land adjoining the rectory, the ecclesiastical commissioners and the patron of the living being also parties to the conveyance, which included a grant to the first defendant "his heirs executors and assigns and his and their tenants "being owners or occupiers of the hereditaments hereby "conveyed" of the "right at all times hereafter with or "without horses carts and agricultural machines and implements to go pass and repass" over a defined strip within the rectory ground, subject to his contributing a fair proportion towards the upkeep of the roadway. There were excepted and reserved to the vendor out of the property conveyed a coachhouse and certain pieces of ground "and also a right at all times "hereafter without horses carriages or carts to go pass and "repass" over a certain field path "and also with or without "horses carts and carriages to go pass and repass" between the rectory and the coachhouse and the pieces of ground retained by the vendor. The land conveyed remained agricultural, except that in 1937 the first defendant leased to a company for seven years the right to take sand and gravel from the property. On the expiration of this lease in 1944 the first defendant purchased a large heap of sand which remained on the property and sold the sand in small lots to purchasers who took it away from time to time. In 1947 he sold the remainder of the heap to the second defendants, E. Baker (Hauliers), Ld. who proceeded to remove it over the right of way granted to the first defendant by "convoys of four, six "or eight lorries coming every day including Sunday." The plaintiff came to the rectory in 1943 as a tenant, and purchased it in 1945, along with the coachhouse and the pieces of ground excepted from the sale to the first defendant; the conveyance repeated the provisions regarding rights of way contained in the former conveyance. The substance of the plaintiff's complaint was that the user of the right of way by the second defendants was excessive, wore the roadway (part of which ran along his drive) into potholes, and endangered his children. He claimed as against the first defendant an injunction to restrain him from using the way otherwise than for the passage of horses, carts and agricultural machines and implements, and as against the second defendant an injunction against trespassing on the way, and contended that the use of motor lorries did not fall within the terms of the grant.

Harold Lightman for the plaintiff.

Milner Holland K.C. and *C. A. Morgan Blake* for the defendants.

[The arguments and cases cited are set out fully in the judgment.]

JENKINS J. The right of way in question depends upon an express grant and, therefore, its extent and the user which it permits must be determined by the construction of the document granting it, that is to say, the conveyance of 1919 to the first defendant. The document must, of course, be construed in the light of the surrounding circumstances, but nevertheless the question is one of construction. Mr. Lightman, for the plaintiff, relies on the fact that at the date of the grant the dominant tenement, that is to say, the land conveyed to the first defendant, was agricultural land. That is a circumstance which it is perfectly legitimate to take into account. He does not contend that one may infer from the fact that the dominant tenement was then agricultural land a limitation of user to purposes connected with the use of the dominant tenement as agricultural land. He expressly disclaimed that contention, and, in my view, he was right in doing so, having regard to the law as laid down in *White* v. *Grand Hotel, Eastbourne, Ld.* (1). The headnote in that case states the law thus: " A right of way granted for general purposes is not to " be restricted to access to the land merely for such purposes " as were reasonably required at the date of the grant; there- " fore a right of way for general purposes to a private dwelling- " house is not affected by the house being turned into an hotel." He, however, contends that the mode in which the dominant tenement was used at the date of the grant is a matter to be taken into account for resolving any doubt as to the modes of user permitted. He says, bearing in mind that the land was

(1) [1913] 1 Ch. 113.

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agricultural land, that a right to pass " with or without horses " carts and agricultural machines and implements " should be construed as meaning horse-drawn carts of the kind one expects to see on a farm road, broadly speaking, and agricultural machines and implements. He uses the character of the dominant tenement as an aid to the construction of the mode of user. But his main argument turns, as I understand it, on the meaning of the word " carts." He says, and says with force, that by a " cart " one means a hand-cart or a cart drawn by a horse, or by some kind of draught animal. No one, he says, has ever heard of a motor cart, and he urges that his contention that " cart " is used in the ordinary sense is reinforced by the circumstance that the land at the time was agricultural land. He contrasts the word " cart " with the word " carriages," which twice appears in the excepted rights of way. He says that " carriage " is a far wider word, and cited *Taylor* v. *Goodwin* (1) as authority for the proposition that even a bicycle is a carriage. In contrast to that he also cited *Danby* v. *Hunter* (2), which related to the use of a cart on the highway by somebody without having his name painted thereon as required by the relevant enactment, and it was " Held that " the ' cart or carriage ' contemplated by the seventy-sixth " section of 5 & 6 William 4, ch. 50, was ' ejusdem generis ' " with a wagon, and that this was not such a cart, and that the " magistrates were therefore right." Of course, that is a case far removed, as indeed is *Taylor* v. *Goodwin* (1), from the present case, but it illustrates the proposition that " cart " is a word with a more restricted meaning than carriage. Mr. Lightman further relied strongly on one particular surrounding circumstance, if one may so term it, namely, that the date of the conveyance to the first defendant was February 13, 1919. He said at that date motor transport was in general use and well known to everybody, and he urged me to hold that it is impossible when one is considering a deed dated in 1919 to regard such an expression as " with or without horses carts and " agricultural machines and implements " as including motor lorries, because if the parties had had motor lorries in mind, they would have expressly mentioned them. By way of contrast he referred to *Attorney-General* v. *Hodgson* (3), which dealt with the question whether a right of carriage, horse and footway through a certain park, granted between the years 1853

(1) (1879) 4 Q. B. D. 228.

(2) (1879) 5 Q. B. D. 20.

(3) [1922] 2 Ch. 429.

and 1861, extended to motor cars. If it extended to motor cars, then it became necessary to consider a question which has nothing to do with the present case, whether certain by-laws preventing the use of the park for motor vehicles were ultra vires or not. The decision, so far as relevant, was "that "the right of carriage way was not restricted to carriages "impelled by any particular kind of traction, and that a motor "car was within the meaning of the grant." Peterson J. said (1): "The plaintiffs' first contention was that the "conveyance to Mr. Milnes did not grant a right of way for "motor vehicles; that the right was confined to carriages to "which was applied the kind of traction known in 1861. "In support of this argument reference was made to various "cases, such as *In re Hall* (2), *In re Ashburnham* (3), *In re* "*White* (4) and *In re Fortlage* (5). These were cases in which "the court in construing wills came to the conclusion that, "having regard to the context, the word 'carriage' did not "include a motor car. But authorities of this kind have not "any bearing on the present case. The question which I have "to consider is what is meant by a carriage way in the con-"veyance of 1861. The right which was granted was a right "to pass along the roads on foot or on horse or in carriages. "There is not, I think, anything in the deed which shows that "the right of carriage way is restricted to carriages which are "impelled by any particular kind of traction; nor is there "in my opinion any ground for saying that the word 'carriage' "ought to be restricted to a carriage drawn by horses. A motor "car, I think, is a carriage within the meaning of this grant." That decision Mr. Lightman sought to distinguish first on the ground that I have already mentioned, that "carriage" is a far wider word than "cart" and a motor car can be properly called a carriage also, that is to say, a motor carriage; secondly, because the document there in question was dated long before the date of motor cars and, thirdly, on the ground that the learned judge was there considering what was called a right of carriage way. It might well be a different thing from a right of passing or repassing with or without a carriage, and was certainly, Mr. Lightman contended, an entirely different thing from a right of passing or repassing with or without a cart. He also referred to *Lock* v. *Abercester, Ld.* (6), which was a case in which Bennett J. had to consider the fact of the changeover from horse to mechanical transport in a case of a way claimed by prescription. The headnote in that case is this: "Where proof is given of the user of a way by carriages "drawn by horses for the required period, so as to establish "the right to an easement for a carriage way, the right so "acquired is one which enables the owner of the dominant "tenement to use the way with mechanically propelled "vehicles." It does not seem to me that that decision really has any bearing on the present case, which is one where one has to ascertain the meaning of the words of an express grant of a right of way exercisable in certain modes. The decision to the effect that user by horse-drawn carriages prescribes for user by mechanical transport does not throw any light therefore, in my view, on this matter.

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(1) [1922] 2 Ch. 429 437

(2) (1912) 107 L. T. 196.

(3) (1912) 107 L. T. 601.

(4) [1916] 1 Ch. 172.

(5) [1916] W. N. 214.

(6) [1939] Ch. 861.

On the other hand, Mr. Milner Holland for the defendants says that this is a right of way for all purposes. He says, and I think he is supported by authority, that a right given to the grantee of property at all times hereafter to go, pass and repass over and along a certain way without any reference to horses, carriages, carts or anything else, will, per se, unelaborated as it is, give a right of way for all purposes, that is to say, a right to pass with vehicles as well as on foot, provided that the way to which the grant refers is a way suitable at the date of the grant for use by vehicles. I think that accords with the statement of the law contained in the judgment of Jessel M.R. in *Cannon* v. *Villars* (1). So, says Mr. Milner Holland, you start with that which would be sufficient in itself to give a right of way for all purposes, but you get superadded to that an explanatory note "with or without "horses carts and agricultural machines and implements." That, according to the argument, is not intended to limit the general right but is intended merely to illustrate, not necessarily exhaustively, the various modes whereby it is contemplated that the right may be exercised. Mr. Milner Holland accepts the difference between the particular modes mentioned in the grant of the way and the particular modes mentioned in the reservation of ways by saying that in the former case the land was, at the date of the grant, agricultural, and so horses, carts, agricultural machines and implements were the typical kinds of things one would expect to find on it, whereas on the other hand, the ways under consideration when one comes to the reservation are ways connected with a private house where one might expect to find carriages. Mr. Milner Holland further contends that, whether that is right or not, the word " carts " in this context should not be restricted to carts drawn by horses. He admits that the word " cart " is not a word apt in itself to describe a motor vehicle. For some reason or other, although the word " lorry," for instance, which was originally a word descriptive of a certain kind of horse-drawn vehicle, was adapted for use in connexion with motor vehicles, and for a time the word " carriage " was so used in the old-fashioned expression " horseless carriage," the word " cart " has never, if I may use the expression, been mechanized. Mr. Milner Holland admits all that, but he says, nevertheless, in this context, that one should not construe the reference to carts as excluding, if I may so describe them, carts propelled by a mechanical means, or in other words, either carts drawn behind a separate mechanical tractor or mechanical horse or carts propelled by a power unit carried on their own frame or chassis. In my judgment, Mr. Milner Holland's argument on this point should prevail. It is unnecessary for me to decide that this is a right of way for all purposes. I propose to limit myself to the question whether the use of this way by motor lorries is an excessive user. In my judgment it is not. I think a reasonable construction should be placed on this grant, and I think it should be construed as meaning that the grantee his executors, assigns, and so forth, and tenants, can pass and repass over the way, either on foot or with vehicles in the nature of carts or with agricultural machines or implements. A cart for this purpose, in my judgment, is primarily a vehicle adapted to carry materials, goods, and so forth, possibly in contradistinction to a vehicle adapted for carrying passengers, and I do not think the particular mode of propulsion of the cart or vehicle is for the present purpose of any materiality at all. I think I can derive assistance from a passage I have read from the judgment of Peterson J. in the *Attorney-General* v. *Hodgson* (1). To hold the contrary would, as it seems to me, produce a really absurd result which I think is not to be imputed to the parties. If Mr. Lightman is right, the way would be available for a horse-drawn cart or lorry or wagon, however large, but would not be available for a motor van, however small. I cannot impute to the parties the intention of making the mode of propulsion the criterion. I think in substance what is granted

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(1) (1878) 8 Ch. D. 415.

(1) [1922] 2 Ch. 429, 437.

is a right of way including carting loads, that is to say, including the right of carting things along the way as well as leading horses along the way, and as well as bringing agricultural implements and machines along the way.

That being the construction I place on the grant, and in view of the admission, in my view rightly made by Mr. Lightman to the effect that the user of the way was not to be limited to purposes connected with the dominant tenement as agricultural lands, it follows in my judgment that no excessive user of the way is involved in its use by the second defendants, as licensees of the first defendant, as a way for carting sand from the dominant tenement by means of three-ton lorries and, that being the excessive user complained of, it follows in my judgment that the case of excessive user has not been made out, with the result that the action fails and must be dismissed with costs.

Action dismissed.

Solicitors for the plaintiff: *Attwater & Liell, agents for H. J. Smith, Braintree.*

Solicitors for the defendants: *G. Howard & Co., agents for Holmes & Hills, Braintree.*

F. R. D.

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Nov. 30; *Dec.* 21.

In re HEATH'S WILL'S TRUSTS.
HAMILTON *v.* LLOYDS BANK LIMITED.

Will — Codicils— Bequest with restraint on anticipation in will executed in 1932—*Codicils executed in* 1937 *confirming will—Abolition of restraint after January* 1, 1936—"*Instrument executed "after January* 1, 1936"—*Republication—Law Reform* (*Married Women and Tortfeasors*) *Act*, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 2 (2.).

The rule that a will is "made" at the date when it is confirmed by a codicil is not to be applied where it would defeat the intention of the testator. Where, therefore, a testator executed before January 1, 1936, a will containing a gift with restraint upon anticipation thereof, and executed after that date codicils which confirmed the will but did not refer to the restraint:—

Held, that the restraint was contained in an instrument executed before January 1, 1936, and in no other, and was therefore

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

unaffected by s. 2, sub-s. 2 of the Law Reform (Married Women and Tortfeasors) Act, 1935.

Berkeley v. *Berkeley* [1946] A. C. 555 considered and distinguished.

In re Moore [1907] 1 I. R. 315 referred to.

ADJOURNED SUMMONS.

By cl. 14 (3.) of his will dated December 10, 1932, Cuthbert Eden Heath conveyed a residuary fund to trustees upon trust, as to two-thirds thereof, to pay the income to his daughter during her life for her separate use and without power of anticipation during coverture, and after her death to hold the capital and income for her children in such shares as she should appoint. He executed four codicils in 1933 and 1934 and two in 1937. None of the codicils referred to the restraint or affected the interest to which it was attached, and all of them confirmed the will. The testator died on March 8, 1939.

By this summons, to which the trustees were defendants, the daughter, now Lady Claud Hamilton, asked, inter alia, whether the restraint was void pursuant to s. 2, sub-s. 2 of the Law Reform (Married Women and Tortfeasors) Act, 1935 (1).

Albery for the plaintiff, Lady Claud Hamilton. Under s. 2, sub-s. 2 of the Act the date on which the restraint was imposed. must be either the date of the codicil or the date of the will. The effect of the sixth codicil, which was executed after 1936 is to repeat the provisions of the will and bring it down to the date of the codicil, thus bringing the restraint within the ambit of the Act.

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(1) By the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2 (1.) it was enacted that all property which either before or after the passing of the Act was held for the separate use of a married woman should belong to her in all respects as if she were a feme sole and might be disposed of accordingly subject to a proviso in the following terms: "Provided "that nothing in this subsection "shall interfere with or render "inoperative any restriction "upon anticipation or alienation "attached to the enjoyment of "any property by virtue of any "provision attaching such a "restriction, contained in any "Act passed before the passing of "this Act or in any instrument "executed before the first day of "January, 1936."

Section 2, sub-s. 2: "Any "instrument executed on or "after the first day of January, "1936, shall, in so far as it pur"ports to attach to the enjoyment "of any property by a woman "any restriction upon antici"pation or alienation which could "not have been attached to the "enjoyment of that property by "a man, be void."

Section 3 (*c*): "The will of any "testator who dies after the thirty"first day of December, 1945, "shall (notwithstanding the "actual date of the execution "thereof) be deemed to have "been executed after the first "day of January, 1936."

The distinction made by Simonds J. in *In re Tredgold* (1) between express and implied confirmation of the will by a codicil is here immaterial, but it is to be noted that in *Berkeley* v. *Berkeley* (2) Lord Simonds stated that he thought he had been wrong in that decision. Alternatively the will and codicils are to be treated as one instrument which was finally executed after 1936. The policy of the Act was to remove restraint ; the provisions for the transition period were intended to avoid hardship in cases where testators were unable to revise their wills before death. Where codicils have been made testators have clearly reconsidered their dispositions and have had an opportunity to substitute a protective trust or some other form of protection for the restraint which would in all circumstances be void if the testator survived until 1946. In *In re Reeves* (3) Russell J., reviewing the authorities, held that the will takes effect as if it were made at the date of the codicil, and that the will and codicil should be treated as one document. See also *Goonewardene* v. *Goonewardene* (4) where a disposition in a will was deemed to operate as if the words of the will had been contained in the codicil. In *Berkeley* v. *Berkeley* (5) Lord Porter said that " provision " meant the actual language used, not the benefit conferred ; on that view the language ties the provision down to the documents and prevents it being carried over to the time when it becomes effective. The effect of the codicil is to incorporate the will ; the provision is " made " at the date of any codicil, a fortiori of a confirmatory codicil. In *Anderson* v. *Anderson* (6) it is the codicil which gives validity to the gift in the will. In *Berkeley* v. *Berkeley* (5) Lord Porter's is the proper exposition of the law after the citation of *In re Elcom* (7), *In re Waring* (8) and *In re Sebag-Montefiore* (9). *In re Elcom* (7) was not cited to Farwell J. in *In re Waring* (8). The effect of *Berkeley* v. *Berkeley* (5) was to convert into dicta the decisions in *In re Waring* (8) and *In re Sebag-Montefiore* (9) because they were overruled on the question of what was the material date.

(1) [1943] Ch. 69.
(2) [1946] A. C. 555, 582.
(3) [1928] Ch. 351.
(4) [1931] A. C. 647.
(5) [1946] A. C. 555, 572.
(6) (1872) L. R. 13 Eq. 381.
(7) [1894] 1 Ch. 303.
(8) [1942] Ch. 426.
(9) [1944] Ch. 331.

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They would now be decided the other way. The effect of the codicil is to repeat the will and republish it: in applying this rule regard must be had to the policy of the statute which had reference to provisions appearing in the will. But Lords Porter and Simonds both regarded the date at which these provisions were " made " as the date of the codicil rather than of the will. Here the whole of the testator's testamentary dispositions should be regarded as a single instrument; the codicil, executed after 1936, repeats the will and is effective to attach the restraint to the property. It is therefore within the Act, and the restraint is void.

Wilfrid Hunt for the trustees, Lloyds Bank. The Act is not retrospective so as to invalidate this restraint. Documents executed before January 1, 1936, are not affected unless those who executed them lived till 1945. In *Berkeley* v. *Berkeley* (1) Lord Porter states the rule that a will is made when it is confirmed by a codicil of later date, though exceptions are made where a strict fulfilment of the rule would defeat the testator's intention: *In re Fraser* (2). If you apply the rule strictly here there is nothing to indicate a change of mind; it is a codicil on a subsidiary point. In *In re Tredgold* (3) Simonds J. says that republication takes place when the will is confirmed in such a way as to acquire some force or efficiency which it did not previously possess, but that it does not always and for all purposes have this effect. Here the will was given no such new efficiency. The testator does not intend to bring the will to the date of the codicil so as to invalidate the provisions of his will. Otherwise gifts to attestors would be void: *In re Marcus* (4). It is a question of construction and should be construed according to common sense. The testator did not say " I confirm the will except the restraint "; he did nothing to invalidate the restraint. It would be contrary to common sense to invalidate provisions in the will merely because it was confirmed: see Jarman on Wills, 7th ed., vol. 1, p. 192, and *In re Moore* (5) which was approved by Romer J. in *In re Hardyman* (6). In *In re Elcom* (7) Lindley L.J. considered how far a will is the aggregate of a person's testamentary dispositions, and said that it was so for many purposes but not for all. In *Rolfe* v. *Perry* (8) a will made before January 1, 1855, was a "will already made" within the meaning of Locke King's Act (which was not retrospective), notwithstanding republication in 1861. There was nothing in *Berkeley* v. *Berkeley* (1) to overrule this decision. In *In re Hardyman* (2) Romer J. cites Barton J. in *In re Moore* (3) to the effect that the rule by which the will spoke from the date of the codicil was not hard and fast but a flexible instrument for effectuating the testator's intentions. The doctrine of republication is applied (1.) where it validates a provision which is intended to be effective in the will, but is ineffective, and would become effective if so treated in the codicil, (2.) to give effect to a gift which had become ineffective. See *Anderson* v. *Anderson* (4), *In re Blackburn* (5) and *In re Hardyman* (2). It is not applied (1.) where it would invalidate an effective provision in the will. See Jarman on Wills, 7th ed., vol. 1, p. 170. (2.) Where it would extend a statute to apply retrospectively: see *Rolfe* v. *Perry* (6). *In re Sebag-Montefiore* (7), which was a direct decision of the Court of Appeal, *In re Waring* (8) and *Berkeley* v. *Berkeley* (1) were all cases where the will was executed prior to the Finance Act, 1941, but confirmed after it, and they show that the principle is not to be applied in such a case as this. Here the codicil had no reference to the interest under restraint, and confirmation shows that the testator did not intend to invalidate it.

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(1) [1946] A. C. 555, 576.
(2) [1904] 1 Ch. 726.
(3) [1943] Ch. 69, 72, 73.
(4) (1887) 57 L. T. 399.
(5) [1907] 1 I. R. 315.
(6) [1925] Ch. 287, 291.
(7) [1894] 1 Ch. 303.
(8) (1863) 3 De G. J. & S. 481.

Cur. adv. vult.

Dec. 21. HARMAN J. The question is whether the execution by the testator of the codicils of 1937 operated, having regard to the terms of the Act of 1935, to invalidate the restraint on anticipation imposed by his will. This is a question of the true construction of the Act and particularly of the proviso to s. 2, sub-s. 1.

Now at first sight and without consulting authority, I should come to the conclusion that this restriction which appears in the will executed on December 10, 1932, was "contained in an instrument executed before" the critical date and therefore was valid; but the plaintiff invokes the doctrine of republication and claims that by executing codicils

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(1) [1946] A. C. 555.
(2) [1925] Ch. 287, 291.
(3) [1907] 1 I. R. 315.
(4) (1872) L. R. 13 Eq. 381.
(5) (1889) 43 Ch. D. 75.
(6) 3 De G. J. & S. 481.
(7) [1944] Ch. 331.
(8) [1942] Ch. 426.

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in 1937 the testator brought his will down to that year and that it must be read in all respects as though executed on the date of his latest codicil, and that if so read the restriction is void under s. 2, sub-s. 2 as being contained in "an instrument "executed after January 1, 1936."

The doctrine of republication of wills has been much canvassed in recent years in connexion with another statute, namely, the Finance Act, 1941. Section 25 of that Act varied provisions as to tax-free annuities by words (so far as relevant) modifying "any provision however worded for the payment of "a stated amount free of income tax .... being a provision "which is contained in any will and was made before "September 3, 1939."

This clause has had a chequered career. It was first considered by Farwell J. in *In re Waring* (1), where the learned judge held that provisions contained in a will do not take effect till the death of the testator and that therefore provision for a tax-free annuity made in the will of a testator dying after September 3, 1939, was not affected though the will bore an earlier date. This decision was reversed by the Court of Appeal, the court holding that the provision was made on the date when the will was executed. There was in that case a codicil after September 3, 1939, but it did not expressly confirm the will and was held irrelevant.

In the next year, however, Simonds J. in the case of *In re Tredgold* (2) had before him a case where there was a will before the date and a codicil after it which expressly confirmed the will, and he distinguished *In re Waring* (1) and held that the provision was made at the date of the codicil and was, therefore, modified. There was no appeal in that case, but the decision was overruled by the Court of Appeal in *In re Sebag-Montefiore* (3) where it was held that the provision was made by a will before the date notwithstanding that there was a subsequent codicil expressly confirming the will. The whole question was reconsidered by the House of Lords in *Berkeley* v. *Berkeley* (4) where the House in effect restored the original decision of Farwell J., and held that the provision was not made till the testator's death. This made it unnecessary to consider the question of confirmation by codicil on which subject the House was divided.

(1) [1942] Ch. 309, 426.
(2) [1943] Ch. 69.
(3) [1944] Ch. 331.
(4) [1946] A. C. 555.

It is to be observed that the majority concluded on that Act that the word " provision " signified the thing given and not the words creating the gift. Lord Porter, the only member of the House who took a contrary view of the meaning of the word " provision," also disagreed with the majority about the relevant date. He held that the relevant date was that of a codicil after 1941 and therefore in the result agreed with the majority while rejecting all their reasons. It appears to me that in the Act of 1935 which I have to consider, the word " provision " could not possibly mean anything but the words used to attach the restriction. This at once deprives me of any real guidance in the construction of the statute of 1935 based on the views of the majority of the House of Lords on the statute of 1941.

Lord Porter's observations are more germane for my purpose (1) ; he held that the provision, that is to say the words creating the bequest, was contained in the last codicil, and he used these words : " The second question is what is the codicil in " which the provision is contained. Originally, no doubt, it is to " be found in the second, but that codicil is confirmed by the " fourth, and in the end it has to be determined which of the " two ultimately ' makes ' it. The inquiry goes back behind " the Wills Act, 1837, to the history of the publication and " republication of wills, an expression now meaningless, but " still unhappily in use. I do not, however, think it necessary " to explore its origin ; it is enough to say that there is a series " of cases since the Wills Act was passed insisting that, just as " the republication of a will substituted the date of the " republication for that of the will before the Wills Act was " passed, so afterwards the will spoke from the date of con" firmation rather than from that of its original execution, " and this result occurred even when there was no express " confirmation contained in the codicil, provided the will was " referred to and it appeared that the codicil intended to confirm " it. To this result it is true there were some exceptions " made with the object of preserving the intention of the " testator where a strict fulfilment of the general rule would " defeat it, *e.g.*, in cases where an exact compliance with the " rules would result in the giving of double portions or would " defeat a gift to charity which the testator obviously intended " to be effective. It may be enough to quote *Grealey* v. " *Sampson* (2) and *Goonewardene* v. *Goonewardene* (3), as

(1) [1946] A. C. 555, 575, 576.
(2) [1917] 1 I. R. 286.
(3) [1931] A. C. 647.

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"exemplifying the rule, and *In re Fraser* (1), as exemplifying "the exception. In the present case, however, there are no "facts rendering either of these two exceptions applicable and "the general rule that a will or earlier codicil is made at the "date when it is confirmed by a codicil of later date must, in my "opinion, prevail."

It will be seen that the principle which he enunciated is according to him not of universal application but only a general rule and is not to be adhered to where it defeats the intention of the testator. That consideration did not apply in *Berkeley* v. *Berkeley* (2) and Lord Porter therefore held that the doctrine of republication prevailed. What is the position here? It seems to me that this testator clearly intended when he made his will ✓ in 1932 to impose this restriction on his daughter and that, so far from changing his mind, he adhered to that view at least until the date of his last codicil in 1937, for each of these instruments confirms the will. If then I am, by applying the doctrine, to prevent the restriction from being effective, I conceive that I am defeating the testator's intention, and if I am to follow Lord Porter's guidance, this must be an exception to the rule.

I turn, therefore, to the earlier cases for guidance as to instances of the application of the rule, or its rejection, and first to *Rolfe* v. *Perry* (3). In that case the will was executed before the coming into force of Locke King's Act which altered the incidence of debts charged on real estate, excepting, however, a "will deed or document already made or to be made before" a certain date. There was a codicil following that date, but Lord Westbury L.C. held that the will was a will "already made" within the exception. His Lordship held that on the construction of the statute a will was "already made" on the date of its execution and not at the date of a codicil republishing it, or the testator's death.

A like case is *In re Elcom* (4) which was concerned with the Act known as Malins' Act (21 & 22 Vict., ch. 57): this entitled a wife to assign a reversionary share provided she was "entitled "under any instrument made after December 31, 1857." The will under which the lady in question claimed was made before that date, but there was a subsequent codicil confirming the will. Chitty J., who was affirmed by the Court of Appeal, held that she was not entitled under any instrument made after

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(1) [1904] 1 Ch. 726.
(2) [1946] A. C. 555.
(3) 3 De G. J. & S. 481.
(4) [1894] 1 Ch. 303.

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December 31, 1857, relying particularly on the word "instrument," and held that whether or no the codicil in terms republished the will was immaterial. In the Court of Appeal, Lindley L.J. made the following observations (1): "The "will was made in March, 1856. Whether it would remain "in force depended on the subsequent proceedings of the "testatrix. She made a codicil in 1864, after December 31, "1857. By this codicil she bequeathed various pecuniary "legacies, and thereby diminished the residue, but did not "otherwise affect the disposition of it. She did not in terms "republish her will; but that, in my judgment, is quite "immaterial. It is ingeniously argued that her will is made "up of the aggregate of all her testamentary instruments, "and for many purposes that is so; but can it be said that "this lady became entitled to this reversionary interest under "an instrument made after December 31, 1857? I think "that it cannot by any ingenuity be made out that she did. "How do you 'make' a testamentary instrument? By "signing it with such formalities as the law requires. Under "what instrument does Mrs. Hamilton derive her title? "Under the will, and the will was made before the Act. "I do not think it necessary to refer to cases—there are none "that throw much light upon the point. The case that comes "nearest is *Rolfe* v. *Perry* (2), and it makes against the appellant. But we do not want cases, for the language of the "Act is plain."

I cite next the Irish case of *In re Moore* (3) which decided that a charitable devise by will dated more than three months before the death followed by a codicil confirming it within three months of the death, was valid notwithstanding s. 16 of the Charitable Donations Act, 1844, which enacts that no devise for charitable uses in Ireland shall be valid to create any estate in lands "unless the will or other instrument "containing the same shall be duly executed three calendar "months at least before the death." Barton J. made the following observations: "It is well settled that for many "purposes republication brings the will down to the date "of the codicil, and makes it speak as a new will of that "date, and take effect as if it had been re-inserted in the codicil "and re-executed at the date of the codicil. But it is equally "well settled that there are limits to the doctrine. 'The

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(1) [1894] 1 Ch. 303, 312.

(2) 3 De G. J. & S. 481.

(3) [1907] 1 I. R. 315, 318.

" ' rule is subject to the limitation that the intention of the " ' testator is not to be defeated thereby ' : per Patteson J. in " *Doe d. Biddulph* v. *Hole* (1). ' It does not necessarily operate " as if the will had been originally made at the date of the " ' codicil ' : per Lord Campbell L.C. in *Hopwood* v. *Hopwood* (2). The effect of the decision of the Court of Appeal " in *Mountcashell* v. *Smyth* (3) is that republication republishes " the will with all its contents, including its original date. " It is as if the old document, with its old date, were translated " into the codicil. Republication gives to the will a fresh " starting point, but it does not erase the old date. Nor does " it, in my opinion, falsify the fact that the will contained a " particular devise and was executed at a particular time. " The authorities which have been cited lead me to the " conclusion that the courts have always treated the principle " that republication makes the will speak as if it had been " re-executed at the date of the codicil not as a rigid formula " or technical rule, but as a useful and flexible instrument for " effectuating a testator's intentions, by ascertaining them " down to the latest date at which they have been expressed."

In the more recent case of *Re Hardyman* (4), Romer J., after considering the cases and citing from *In re Moore* (5), made the following observations : " In other words the " court, for the purposes of ascertaining the intention " of the testator, would regard the republication of " the will by the codicil as an expression of the testator's " intention as at that date. When, therefore, the " testator, at the date of his codicil, by which time legacy " duty had been replaced by succession duty, expressed a wish " that the legacy duty on the particular legacy should be paid, " the court was able to arrive at the conclusion that the testator " intended to refer to succession duty."

Then he cites from *In re Moore* (5), and he goes on : " It " appears to me, in the circumstances, and having regard to the " authorities, that I must construe the present will in light " of the fact that by republication the testatrix has said to me : " ' This will expresses my intentions at this date ' (i.e., the " date at which this codicil was made), and that I must not " disregard that fact," and he came to the conclusion that in that case he would be effectuating the testator's intention by power of revocation. Of course, the whole of that argument of Mr. Blain's falls to the ground if his initial proposition as to the scope of s. 34 is wrong, because if the contract, in so far as it would have the effect of restricting the powers of the authority is void, then no revocation would be necessary; the authority could simply disregard those restrictions.

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(1) (1850) 15 Q. B. 848.

(2) (1859) 7 H. L. C. 728.

(3) [1895] 1 I. R. 346.

(4) [1925] Ch. 287, 292.

(5) [1907] 1 I. R. 315.

To round off the relevant matters of fact, the defendants took into consideration the position raised when after the war the plaintiffs in terms applied for permission to develop on the lines of the agreement. That permission, according to Mr. Blain's argument, was quite unnecessary because they had at that moment the contractual right to continue that development, and nothing the defendants could do or say could stop them. No further permission, therefore, was necessary according to that argument. Permission was in fact refused, but the defendants' town clerk quite properly pointed out that there was a complication in the position owing to the existence of the development agreement. What view was formed as to the effect of that agreement in law by the parties who prepared it and entered into it, I do not know ; but the defendants might very well think twice before they went back on what appears to have been the intention of the agreement, namely, that the scheme as ultimately intended to be carried into effect should contain those restrictions and no greater restrictions. In the meanwhile a further complication had occurred. A plan called the Greater London Plan had been prepared, and was very much in the public eye and in the eye of the Ministry, and the local authorities concerned. In fact, the Minister sent to the local authorities concerned a circular calling their attention to it. This area was in the ambit of that plan, and this area was part of what is called the green belt, and certain proposed arterial roads were to run across it. Of course, if that plan were to be carried out it would be quite impossible for the houses which are mentioied in the agreement ever to be built. The two things are completely inconsistent and, according to Mr. Blain's argument, the authority would not be entitled, however much it changed its mind, to depart from the terms of this agreement. Of course, if, by virtue of overriding powers, the Minister could interfere, that would not be the fault of the authority and would not constitute any breach by it of the agreement; but the authority itself, it is said, must not do anything which would involve a departure from what was contemplated by the agreement. It seems to me obvious that the powers to revoke permissions and the overriding power of the Minister in that regard given by s. 4 of the Act of 1943 have a very sensible application, because an interim development permission might very well impede, directly or indirectly, the formulation of satisfactory schemes. An authority who had given permission to a landowner might, as a practical matter, be unable to revoke it, or to insert in the scheme any different or improved provision. Therefore it is given powers to revoke subject to compensation of a limited description. In the event of their not exercising the powers the Minister is given an overriding power to take the matter in his own hands and himself make the revocation on behalf of the authority. As I have said, Mr. Blain's remarks on this section have only any applicability if he is right on his construction of s. 34, and I might content myself with saying that, as I think he is wrong on that, this point under s. 4 does not arise. But the further point is taken that, even if he was right on his construction of s. 34, all that is being attempted to be done here is to make a revocation of a permission such as is contemplated by sub-s. 1 of s. 4 of the Act of 1943. It is said that cl. 4 (*a*) of the agreement, which expressly gives the right to interim development, is nothing more nor less than a permission under s. 10 of the Act of 1932. The fact that it is incorporated in this document with a number of other things does not make it in character anything different from a permission and, being such, it is revocable under s. 4, sub-s. 1, of the Act of 1943. The position was that an application for permission under s. 10 had been made; all the necessary formalities had been gone through. It could have been dealt with simply as a permission and granted or not by itself. That was not done. The parties were in negotiation and were discussing a variety of matters, and they incorporated the permission in this agreement. That does not, in my opinion, alter its character as a mere permission or deprive the authority of the powers, in the case of development for which permission has been granted on an interim development application, of revoking that permission.

But even if that be wrong, there is a further point. It seems to me that under cl. 4 (*a*) of the agreement on its true construction the parties have contracted that the permission shall have the same effect as a permission under s. 10 of the Act of 1932. That means, as I see it, that they agreed that the permission which is in fact incorporated in this agreement was to be no better and no worse than a permission granted permission to develop the plaintiffs' land, that permission was obtained or must be treated as having been obtained under s. 10 of the Act of 1932 (as was in terms agreed in cl. 4 (*a*) of the agreement) and was therefore capable of being revoked.

Decision of Romer J. [1948] Ch. 369 affirmed but for different reasons.

Attorney-General v. *Barnes Corporation & Ranelagh Club, Ld.* [1939] Ch. 110 distinguished.

APPEAL from Romer J. (1)

The defendants and their predecessors the Surbiton Urban District Council were, at all material times, the interim development authority for their area for the purposes of the Town and Country Planning Acts, 1932, 1943 and 1944, the borough of Surbiton having been incorporated as from November 9, 1936. On March 22, 1934, an appeal was made to the Minister of Health by MacDonald and Kennedy, Ld. against the refusal of the Surbiton Urban District Council to grant permission for development under the Town and Country Planning (General Interim Development) Order, 1933, of about 85 acres of land at Chessington, Surrey, known as the Chessington Hall Estate, in accordance with the layout submitted to the council. On May 11, 1934, the Minister in exercise of the powers conferred on him by s. 10, sub-s. 5, of the Town and Country Planning Act, 1932, made an order on the appeal granting "permission for the erection of not "more than 10 shops and 763 dwelling-houses on the said land "in accordance with the said plan or with any amended lay-"out plan which may be approved by the council, or by the "Minister of Health on appeal, subject to the approval by the "council under the said order, or by the Minister of Health "on appeal, of the particulars of the proposed development "and to due compliance with any local Acts, regulations, "building by-laws and general statutory provisions in force in "the urban district and applicable to the development."

On August 22, 1934, McDonald & Kennedy, Ld. conveyed about 15 acres of the estate to the Surbiton Urban District Council for open space purposes; and on May 8, 1935, they conveyed the remainder of the estate consisting of about 70 acres to the Chessington Development Co., Ld. (hereinafter called Chessingtons) in fee simple. On December 31, 1936,

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(1) Reported sub nom. *Chessington Development Co.* v. *Surbiton Borough Council. Ransome & Luck, Ld.* v. *Surbiton Borough Council* [1948] Ch. 369, the hearing of the appeal in the first of these two actions being postponed to await the result of this appeal.

Chessingtons conveyed to the plaintiffs certain portions of that land, in area about 23 acres, and at various times between May 8, 1935 and May 19, 1939, conveyed to the Southern Railway Co. certain other portions of the estate.

On January 10, 1938, the defendants made a scheme under the Act of 1932 and on February 7, 1938, submitted it to the Minister of Health for approval. As a result of subsequent legislation the powers of the Minister of Health were transferred to the Minister of Town and Country Planning, but the scheme of 1938 had never been approved.

By letter, dated February 10, 1937, the surveyors to the plaintiffs and Chessingtons submitted to the defendants a formal and detailed application for permission for the development of their properties on the Chessington Hall Estate. Permission was at first refused but on April 17, 1937, the town clerk of Surbiton wrote giving their approval to the development proposals subject to certain conditions, one of which was that there should be an agreement under the Town and Country Planning Act, 1932, and the Restriction of Ribbon Development Act, 1935.

On May 19, 1939, two agreements under seal were executed. The first (hereinafter called "the development "agreement") was made between the defendants of the first part, the plaintiffs of the second part and Chessingtons of the third part. The second agreement (hereinafter called "the "roads and sewers agreement") was made between the same parties of the first three parts, the Southern Railway Co. of the fourth part and Clement Hugh Bridge of the fifth part. The first agreement was so far as material as follows:

"Whereas (1.) the Council are the local authority for the "purposes of the Town and Country Planning Act, 1932 "(hereinafter referred to as the Act) for the borough of Surbiton "and have submitted to the Minister of Health for approval "a planning scheme for the said borough (hereinafter called the "scheme)."

"(2.) The owners [meaning the plaintiffs] are the "owners of the fee simple of the land described in the first "part of the first schedule hereto and the Development Co. "[meaning Chessingtons] are the owners in fee simple of the "land described in the second part of the first schedule hereto "which lands are situate within the area of the scheme . . . ."

"(3.) By an instrument in writing dated May 11, 1934, the "Minister of Health in exercise of the powers reserved to him

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" under s. 10, sub-s. 3, of the Act allowed an appeal to him " under that section in relation to the [substantially identical] " lands referred to in the first and second parts of the first " schedule hereto and granted permission for the develop- " ment of the said lands in accordance with a lay-out plan " a copy of which accompanied the said appeal or with any " amended lay-out plan approved by the Council or by the said " Minister on appeal."

" (4.) It has been agreed between the parties hereto " that the proposals as shown in the said lay-out plan " approved by the Minister are superseded by the " provisions of this agreement. Now this agreement " witnesseth :—

" 1. This agreement is made by virtue of s. 34 of the Act " and is intended to be scheduled to the scheme."

" 2. This agreement is supplemental to and as respect the " parties hereto in consideration of the agreement of even " date herewith "—meaning the roads and sewers agreement.

" 3. The lands described in the 1st and 2nd parts of the " First Schedule hereto may be used for the purposes " mentioned in and subject to the restrictions set out in the " second schedule hereto and in accordance with the lay- " out in Plan No. 2 hereto annexed."

" 4. (*a*) Until the scheme shall come into force this agreement " shall operate as if the owners and the Development Co. had " submitted an amended lay-out plan for the approval of the " Council and the Council by this agreement had approved " the said plan and had granted permission to the owners and " development company to develop by virtue of s. 10 of the Act " and the Town and Country Planning (General Interim " Development) Order, 1933."

" (*b*) To the extent to which this agreement operates and is " valid as from the date of this agreement the recited instrument " in writing dated May 11, 1934, shall cease to have effect."

The roads and sewers agreement related only to the making of roads and construction of sewers on the Chessington Hall Estate. For reasons connected with the war the plaintiffs were unable to start developing their land in 1939.

In exercise of the powers conferred by s. 3 of the Act of 1932 and of all other power them enabling the defendants concurred on October 9, 1944, with the Surrey County Council and with other planning authorities in north-east Surrey in appointing a joint planning committee known as the North-East Surrey

Joint Planning Committee, and in delegating to that committee all their powers and imposing on them all their duties in connexion with the preparation of a scheme for the borough of Surbiton. This committee became the planning authority as from November 1, 1944.

In the same year a plan known as "the Greater London "Plan" was prepared for the planning of the area of Greater London including the borough of Surbiton. In this plan the Chessington Hall Estate was included in the local green belt therein referred to and there were proposals for a "D" ring road round London, and a proposed radial arterial road from London to Portsmouth which would run through the estate. The Greater London Plan was submitted to the Minister of Town and Country Planning and although it had no statutory effect, the Minister on December 14, 1945, sent to the defendants and all other interim development authorities in the area covered by the plan a memorandum for their guidance. Some 16½ acres of the plaintiffs' land were requisitioned by the War Office and so remained.

By letter dated January 4, 1946, the plaintiffs enquired as to the land not requisitioned "whether permission to develop in "accordance with the agreement of 1939" would be granted and a layout plan was submitted with the letter showing proposals for seventy houses on approximately 6½ acres of land fronting Leatherhead Road and Chalky Lane. On February 26, 1946, the defendants refused to permit the development proposed on the ground that it would contravene the proposals of the Greater London Plan. On February 27, 1946, the North-East Surrey Joint Planning Committee as the planning authority concerned, resolved (with a verbal amendment made on December 18, 1946) that under the scheme in course of preparation by them, an area which included the said land should be zoned in accordance with the proposals of the Greater London Plan. On March 26, 1946, the plaintiffs by their solicitors appealed to the Minister against the defendants' refusal of permission. By the Surbiton Town and Country Planning (Interim Development) Direction dated July 12, 1946, the Minister pursuant to the powers conferred on him by s. 4, sub-s. 2, of the Town and Country Planning Act, 1943, and of all other powers enabling him, directed the defendants to submit to him for consent under s. 4, sub-s. 1, an order revoking the permission granted on May 19, 1939, to Chessingtons and the plaintiffs for the development of part of the Chessington Hall

Estate and also the permission given by the Minister of Health, to McDonald & Kennedy, Ld. on May 11, 1934. On July 29, 1946, the defendants decided that an order should be made with the consent of the Minister, revoking the said permissions and on August 8, 1946, informed Chessingtons and the plaintiffs that they proposed to do this. On August 16, 1946, the defendants submitted to the Minister a draft of the order proposed in the event of the Minister's consent being given. The decision of the Minister had not yet been made known to the plaintiffs. On January 8, 1947, the plaintiffs issued the writ in this action and by their statement of claim reduced the claim in the action to one for damages for breaches of the development agreement.

Romer J. while unwilling to hold that the development agreement entered into under s. 34 of the Town and Country Planning Act, 1932, was purely restrictive, dismissed the appeal on the grounds that cl. 3 of the agreement had not been contravened because the scheme never came into force and that the defendants did not expressly or impliedly promise not to cancel the permission given by cl. 4 which was referable to the powers conferred by s. 10 of the Act of 1932 (1), should circumstances require it and subsequent legislation authorize it. The plaintiffs appealed.

Eric H. Blain and *Peter Boydell* for the plaintiffs. The issue is whether there have been actionable breaches of the development agreement by the defendants as the interim development authority in refusing permission to develop the plaintiffs' land, although the plan submitted kept within the restrictions imposed by the agreement entered into by virtue of s. 34 of the Act of 1932 (1). It is true that s. 4 of the Town

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(1) Town and Country Planning Act, 1932, s. 10, sub-s. 1: "The "Minister shall make a general "order with respect to the interim "development of land within the "areas to which resolutions to "prepare or adopt a scheme "apply and may make special "orders with respect to the "interim development of any "such land in any particular "area. For the purposes of this "section the expression 'interim "'development' means development between the date on which "the resolution takes effect, and "the date of the coming into "operation of the scheme."

Sub-section 2: "An order made "under the preceding subsection "(in this Act referred to as an "'interim development order') "may itself permit the development of land either conditionally "or subject to any condition "specified in the order, or may "empower any authority so specified to permit the development and Country Planning (Interim Development) Act, 1943, gave power to the interim development authority in certain circumstances to make an order with the consent of the Minister, revoking leave previously given for development. But the agreement under s. 34 of the Act of 1932 could not, it is contended, be revoked under that Act. Section 10 of the Act of 1932 enables the Minister to give an interim development authority power to permit development between the preparation of a scheme and its coming into effect. It is submitted that s. 4 of the Act of 1943 applies to such a case to enable the permission given to be revoked and not to a case where there has been a development agreement under s. 34 of the Act of 1932. Under this agreement the authority is given power to enforce restrictions agreed to without waiting for the scheme and there is, it is contended, no power either in the authority or the Minister to revoke permission given under s. 34. That view receives support from s. 10 of the Act of 1943 which provides that no agreement entered into under s. 34 of the Act of 1932 after the commencement of the Act shall have effect unless approved by the Minister. It follows that the sanctity of an agreement entered into before the Act came into force was preserved.

" of land in accordance with the " terms of the order."

Sub-section 3 : " Where an " application for permission to " develop land is made to the " specified authority in manner " provided by the order, the " authority may, subject to the " terms of the order, grant the " application unconditionally or " subject to such conditions as " they think proper to impose, " or may refuse the application " . . . ."

Sub-section 5 gives an aggrieved applicant the right of appeal to the Minister.

Section 34, sub-s. 1 : " Where " any person is willing to agree " with any such authority as is " mentioned in subsection (2.) " of this section that his land, or " any part thereof, shall, so far as " his interest in the land enables " him to bind it, be made, subject, " either permanently or for a " specified period, to conditions " restricting the planning, development, or use thereof in " any manner in which those " matters might be dealt with by " or under a scheme, the authority " may, if they think fit, enter " into an agreement with him to " that effect and shall have power " to enforce the agreement against " persons deriving title under him " in the like manner and to the " like extent as if the authority " were possessed of, or interested " in, adjacent land and as if the " agreement had been entered " into for the benefit of that " adjacent land."

Sub-section 2 : " Agreements " may be entered into under this " section by a local authority, a " county council, or a responsible " authority, not being a local " authority or a county council."

So far it has been assumed that Romer J. was right in holding that under the agreement there was an express or implied agreement by the local authority to permit development by the plaintiffs so long as it kept within the restrictions entered into by them. The significance of an agreement under s. 34 is that it enables the authority to enforce control in accordance with the restrictions entered into without waiting for the scheme to be approved and there must be consideration for this which it is suggested is the local authority's permission to develop accordingly. Romer J. was right in following *Attorney-General* v. *Barnes Corporation and Ranelagh Club, Ld.* (1) which is directly in point.

[LORD GREENE M.R. How can it be possible for an authority that is not a planning authority as permitted by s. 34, sub-s. 2, to enter into an agreement under sub-s. 1, if it can contain provisions binding the planning authority? Is it not clear that s. 34, sub-s. 1, only allows agreement by a landowner in restriction of his rights?]

If that were so how could a landowner be expected to bind himself by restrictions on his land? There must be consideration flowing from the local authority. Romer J. was right to follow the *Ranelagh* case (1) and hold that there was nothing so to cut down s. 34, sub-s. 1.

[LORD GREENE M.R. That case is very different for it only raises the question whether a local authority could accept from a landowner restrictions less severe than those imposed on neighbouring landowners.]

The fact that the development agreement contains permissive provisions does not prevent it from being a valid agreement under s. 34. Why should Parliament under s. 10 of the Act of 1943 make future agreements under s. 34 subject to the approval of the Minister if permissive clauses could not be included in any such agreement? The inclusion of the plaintiffs' land in the green belt would reduce its value from 1,000*l.* to 100*l.* an acre.

To sum up, the contentions sought to be established on this appeal are:

(1.) An interim development authority could not enter into an agreement regulating the development of land except under s. 34.

(2.) An agreement under s. 34 was enforceable by the local authority or covenantee before the passing of the Act of 1943, whereas the terms of an interim permission under s. 10 were

(1) [1939] Ch. 110.

not immediately enforceable. This permission left the landowner free to act as he wished, subject to the risk of being compelled to pull down buildings not according with the scheme when approved without any right to compensation.

(3.) An agreement under s. 34 may be in part permissive so long as it is an agreement which restricts the landowner's use of his land.

[SOMERVELL L.J. Why should not s. 34 be construed strictly and so avoid importing what is already permitted by s. 10 ?]

Because there must be material consideration for what the landowner is giving up.

(4.) On the basis that contention No. 3 is correct the development agreement in this case must be treated as giving the landowners powers to build within the limits of the restrictions they have agreed upon.

(5.) Assuming this to be so there is no right under s. 4 of the Act of 1943 to revoke the permission granted. Clauses 1, 3 and 4 of the development agreement relate entirely to matters agreed to under s. 34.

(6.) There was a clear breach of the agreement on the footing that it contained permissive clauses.

(7.) The conduct of the defendants in this case amounted to an anticipatory breach.

It was a repudiation of the agreement when the defendants applied for the consent of the Minister to their revoking the permissions previously given. It was not for the defendants to take the initial steps to prevent the fulfilment of the agreement which in so far as it was restrictive prevented the plaintiffs from doing what they liked with their land apart from the powers of the defendants.

The question is whether para. 4 of the agreement authorized the defendants to cancel the permission which had been given. Clause 3 of the agreement deals with the position after a scheme has come into operation. Clause 4 deals with the position before then and authorizes the plaintiffs to carry on development until a scheme is made and accordingly there is no need to apply for interim development permission under s. 10 of the Act of 1932. This explains cl. 4.

If the defendants put forward a scheme inconsistent with cl. 3 of the agreement that would be a breach of contract or if they fail to annex the agreement to the scheme in accordance with cl. 1 that would be a breach of contract. The effect of the agreement is to bind the defendants not to go to the Minister for any order not complying with its terms.

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Capewell K.C. and *Wilfred Hunt* for the defendants. It is submitted that s. 34 is purely restrictive in scope. Here there are two agreements; the one consists of positive provisions and the other of restrictive provisions. The marginal note to s. 34 is right. That section is limited to agreements restricting the use of land. The words used are apt to attach the benefit of the covenants to land. This cannot be done in the case of positive covenants: *Austerberry* v. *Oldham Corporation* (1). Accordingly if there had been an assignment of the land s. 34 would not enable any affirmative covenants by the plaintiffs as landowners to be enforced by the defendants against their successors in title. That knocks out the affirmative covenants by the plaintiffs. The negative covenants cannot enure for the benefit of successors in title of the landowners so as to enable them to enforce them against the defendants. Section 34 is designed only to deal with restrictions which run with the land and to meet the difficulty caused by the decision in *London County Council* v. *Allen* (2).

It is submitted then that the position is that s. 34 only enables restrictive covenants to be imposed. It follows that any agreement which is not restrictive but positive is void. Secondly, upon the true construction of cl. 4 it must be treated as being an interim development permission for all purposes. If so, the defendants did not and could not bind themselves not to use any statutory powers subsequently conferred upon them. They are entitled to resort to s. 4 of the Town and Country Planning (Interim Development) Act, 1943. The plaintiffs would then be entitled to compensation for abortive expenditure under s. 7 of the Act of 1943. Section 4 of the Act of 1943 only applies to interim development which has not been completed. Lastly the refusal to consent to the development was not a breach of the agreement. The plaintiffs waived any breach of the agreement by appealing to the Minister. Romer J.'s decision was right.

Eric H. Blain in reply. The agreement bound the defendants for all time and if they break it they are liable in damages whether they break it in exercise of statutory powers or otherwise. The defendants contracted not to take any steps to impose additional restrictions on the land. By taking such steps they have broken the agreement.

Lord Greene M.R. The discussion in this appeal has led to some rather complicated considerations, but, in my opinion, the answer to it is comparatively simple.

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(1) (1885) 29 Ch. D. 750.

(2) [1914] 3 K. B. 642.

The plaintiffs are the owners of land at Chessington in the area of the defendants, the Surbiton Borough Council. That council is the planning authority and the interim development authority in respect of that area under the Town and Country Planning Acts. The plaintiffs had as neighbouring landowners a company called the Chessington Development Co., Ld., who brought a similar action against the borough council, which was tried at the same time. No appeal from the judgment in that action is before us, although notice of appeal has been served. The decision with regard to that appeal is very sensibly left to await the hearing of this present appeal. The action in its original form, as appears from the endorsement on the writ, claimed damages for breach of an agreement, a declaration that under the agreement the plaintiffs were entitled to erect houses and buildings, and an injunction to restrain the defendants from taking any steps to prevent the plaintiffs from erecting them. When the statement of claim was delivered the second and third claims to relief were dropped; there only remained a claim for damages. That claim is based on the proposition that the agreement has been repudiated by the borough council and that the plaintiffs, therefore, are entitled to claim damages as for an entire breach. Of course, in that proposition is implicit the assertion that the plaintiffs accepted the breach alleged as a repudiation of the agreement, thereby discharging it altogether.

The case of the plaintiffs is really based on the construction and effect of s. 34 of the Town and Country Planning Act, 1932, which is the main piece of legislation with which we are concerned. The Act was a comprehensive Act in relation to town and country planning. It contained the well-known provisions for the making of schemes, dealt with the various stages for bringing them into force, with the powers of the Minister in relation to them, and the rights of objectors, and so forth. Under that Act very large and very important powers are given to the planning authorities, and the scheme, when it has gone through all the necessary stages and has become a definitive scheme, acquires, by one of the schedules to the Act, what is equivalent to statutory force. The main part of the Act is taken up with the provisions relating to the making of schemes; but, of course, schemes would take a long time to

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prepare, and provision was made for what might be done in the meanwhile under the provisions relating to the interim development of land. That is provided for by s. 10. Under that section the Minister is to make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply. This was such an area. Under sub-s. 2 an order so made by the Minister might itself permit the development of land, or might empower an authority to permit it. Under sub-s. 3, when the authority is applied to for permission to develop, it may grant the application either unconditionally or subject to such conditions as it thinks fit. I may say in passing that the word "development" is not confined to the construction of buildings, but includes a change of user from that existing at the time. That appears in the definition section. Under s. 10 there was in case the authority refused consent to an interim application, a right of appeal to the Minister. In the present case that machinery was gone through by the plaintiffs' predecessors in title. An application made by them for permission for interim development was refused. They took the matter on appeal to the Minister, and the Minister reversed the decision of the local authority. In that state of affairs the plaintiffs afterwards entered into negotiations with the defendants. Permission was again applied for to the defendants and a new and different plan was agreed, and finally the parties, after discussion, entered into two agreements under seal. One of them is called the development agreement and the other the roads and sewers agreement and they are both dated May 19, 1939.

[His Lordship stated the names of the parties to the two agreements and that the convenants they contained were in part restrictive and in part affirmative :]

The essence of the case put forward by the plaintiffs relates to the development agreement. They say that, upon its true construction, the agreement contains, either expressly or by necessary implication, an undertaking by the local authority, in consideration of the restrictions assented to by the landowners, not to interfere in any way with the development of their land provided that it is in accordance with the scheme of those restrictions. The importance of that argument arises in this way. We are not here dealing with a subject-matter which can be permanent as in the case of an ordinary contract. The period with which the agreement is concerned is what I call the interim period as well as the period if and when a final scheme comes into effect. It would be possible in a case where permission for interim development has been granted under s. 10 for that interim development to be annulled and the physical results of it destroyed by the scheme which ultimately comes into operation; in other words, there is nothing permanent about it, but there are provisions in the Act relating to compensation in cases where a party is aggrieved or damnified by something which is done to what he has done under the interim permission. But the argument here, based on s. 34, goes a step further. It is said that under that section it is competent to the local authority, when accepting the offer of a landlord to subject his land to restrictions, itself to enter into a covenant that can be called affirmative or negative, not to interfere with the operations of that landlord within the limits specified by the restrictions. If the landlord, in this case, wishes to erect upon his land the number of houses to which he is restricted under the development agreement, the defendants maintain that, under statutory provisions to which I shall refer, they have power to revoke any permission that they have given or to cancel, or procure the cancellation of, any agreement that they have entered into. It is asserted by the plaintiffs that by doing so the local authority commits a breach.

The first thing to do, in my opinion, is to examine s. 34, and the reason for the fundamental importance of doing so is that, if Mr. Blain's argument is right, the section will have empowered the planning authority to bargain away its statutory powers of planning and of altering its plans at any time before a scheme is finally approved. These are the powers which are conferred upon it by the Act in the public interest and yet the agreement on which he relies would, according to his interpretation of it, have the effect of stabilizing the quantity or quality of development without any possibility of the planning authority ever being able afterwards to alter it except on the terms of paying damages for breach of contract. I am bound to say that in approaching this section in an Act of this character I do so without any expectation that I shall find in it a power for the planning authority to bargain away the important powers that the legislature has conferred upon it. I would first call attention to the fact that this section is to be found in a fasciculus of sections headed by a cross-heading "Supplemental provisions "with respect to schemes." That fasciculus begins with s. 27 and ends with s. 34. Those sections deal with a miscellaneous collection of matters and all of them—I exclude for the moment s. 34, because that is the section we are construing—are ancilliary in some way to the making of schemes. When I come to s. 34 itself, I call attention, first of all, to the fact that under sub-s. 2 the local authorities empowered to enter into such agreements as are mentioned in sub-s. 1 comprise authorities which need not be planning authorities at all ; and yet, if Mr. Blain is right, the effect of entering into such an agreement is, in substance, to do a great deal of planning and to carry out a great deal of the effective results of planning which are given, subject to many checks and balances, to planning authorities. Sub-section 1 itself starts in this way : " Where any person is willing to agree " with any such authority as is mentioned in sub-s. 2 of this " section that his land, or any part thereof, shall, so far as his " interest in the land enables him to bind it, be made subject, " either permanently or for a specified period, to conditions " restricting the planning, development, or use thereof in any " manner in which those matters might be dealt with by " or under a scheme." That is what I may call the contemplated initiation leading to an agreement under the sub-section. There must be a landowner who is willing to agree that his land shall be subject to restrictions of the character which might be inserted lawfully in a scheme. When a willing person has appeared on the scene and announced his willingness, we now come to what the local authority may do in response to his offer, " the authority may, if they think fit, " enter into an agreement with him to that effect," that is to say, to the effect of subjecting his land to restrictions. That, and nothing more, is expressly mentioned.

Pausing there for a moment, I might usefully make an excursion into the law of property and state the well-known fact that restrictive covenants, apart from some special provision like those we are going to find here, only run in equity so as to bind the land when they are taken for the benefit of the adjoining land of a covenantee. Parliament was minded to make use of that very valuable principle, but, in order to do so it had to put the local authority artificially into the same position as a neighbouring landowner, because a restrictive covenant entered into by the landowner with the local authority would not bind the land under the ordinary law, for it would not have been made for the benefit of adjoining land. The way the legislature does this is by a very simple device of draftsmanship. After empowering the local authority to enter into an agreement to that effect, it puts in a provision necessary to give that agreement binding and permanent force against the land. The sub-section goes on: "and shall have power to "enforce the agreement against persons deriving title under "him in the like manner and to the like extent as if the "authority were possessed of, or interested in, adjacent land "and as if the agreement had been entered into for the benefit "of that adjacent land." It appears to me that s. 34 is a section of a very limited application. It is a section which gives power to do, in terms, one thing and one thing only, namely, power to a local authority to accept restrictions offered to it by a landowner and by so doing to acquire the right to enforce those restrictions against the land as if they had been entered into for the benefit of an adjoining landowner. There is not a word in the section which specifies or limits the consideration which the local authority is to give, or shall be able to give, for the subjection by the landowner of his land to the restrictions indicated. Here we are only concerned with one type of consideration. The consideration in the present case, the plaintiffs say, was an implied or expressed—I think it could be implied only—undertaking by the local authority not to do anything in exercise of its statutory planning powers which might go beyond the restrictions entered into by the landowner. In other words, the consideration is said to consist of a partial, or perhaps total, relinquishment by a planning authority of certain of its statutory powers in relation to planning. I think it is conceded that unless there is to be found somewhere in the statute statutory power to a planning authority to restrict or tie its hands in the matter of planning, no such power could exist; and the importance of s. 34 is that, according to Mr. Blain, that power is to be found in the section itself.

I ask myself this question: Is it likely that Parliament, in a section falling under the head I have mentioned and without express words to that effect would do anything so unusual, so explosive, as to enable a planning authority to do that which all the principles laid down and observed by the courts and the legislature in regard to statutory duties of this kind forbid, namely, to tie its hands and contract itself out of them? Parliament could do it if it wanted to, I have no doubt. The weakness, if I may be allowed to say so, of the argument, when it is really appreciated, is that it is based on what it is said to be possible to extract from the single word, "agreement."

A local authority, says Mr. Blain, is authorized to enter into an agreement. An agreement implies consideration of some kind. Incidentally, I may say that it might be under seal and still be an agreement, as these documents are here. An agreement, he says, apart from documents under seal, imports consideration and requires consideration. What objection can there be, he says, to the planning authority, by way of consideration for the subjection of the landowner to these restrictions, itself undertaking not to affect his land by subjecting it to some plan by action on their part which would have the effect of preventing the landowner building up to the limit of the restrictions into which he has entered ? Then he says that, as there is nothing in the section to prevent the making of such an agreement, you must construe the section as though it authorized it and give effect to it. Incidentally, I might point out that such an undertaking, if it is to be found in an agreement under s. 34, would be an undertaking by the authority ; it would be a contractual undertaking entered into with an individual. I find nothing either in the section or in the general law which would enable, for instance, the successors in title of the landowner, who would be the covenantee with regard to such a covenant, to enforce it against the authority. The running of the burden of the restrictive covenant entered into by the landowner is provided for expressly by the section. The running of the benefit of any restrictive covenant which the authority may enter into restricting its planning powers is not mentioned in the section, nor is any provision made for it. One would have expected that, if the intention had been what Mr. Blain says it was, the section would have expressly provided for what I may call mutuality, that both parties and the successors in title of the landowner should not only be bound, but should be entitled to the benefit of these covenants which he contemplates. Nothing of the kind is mentioned.

Romer J. did, I think, accept the view that s. 34 authorized the local authority to enter into restrictive agreements which might have the effect of limiting or circumscribing the exercise of their statutory planning powers. He felt himself constrained, I think, to take that view by *Attorney-General* v. *Barnes Corporation and Ranelagh Club, Ld.* (1), an authority decided by Luxmoore J. I myself do not read his decision as in any way covering this sort of case. The contest there was whether it was competent to a local authority to agree with a landowner for restrictions less severe than had been imposed on neighbouring landowners, and it was said that if a local authority tries to do that it is in effect doing something permissive and not something restrictive. That view the learned judge negatived. In substance what the landowners were doing there was that they were restricting themselves by entering into restrictive agreements to that effect, and because of the fact that those restrictive agreements were, as I understand it, less severe than those imposed in the area, or proposed to be imposed, it was suggested that they must be regarded as permissive. That is quite a different question from the one which we have here. If Luxmoore J.'s language is wide enough to cover Mr. Blain's proposition in the present case, then I would respectfully disagree with it. I do not think it has that meaning, and in any event I cannot accept the view that s. 34 empowers a planning authority by an agreement under that section in any way to tie its hands for the future.

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(1) [1939] Ch. 110.

I think at this stage I should refer, very shortly, to one or two things in the development agreement. It recites, among other things, the Minister's reversal of the local authority's refusal to grant interim permission. [His Lordship read cll. 1, 2 and 3 of the recitals and continued :] Down to there, in my opinion, the agreement is defining what it is proposed to include in the matter of restrictions on these lands in the scheme when it is finally settled ; but that, of course, was not enough. Very naturally the landowner wishing to develop the land would want to get ahead and build the houses that it was contemplated could be built under the proposals to be embodied in the scheme. That is provided for in cl. 4. [His Lordship read cl. 4 (*a*) and (*b*).] Then by (*c*) the objections made by the owners to the approval of the scheme itself were withdrawn. Having regard to the conclusion to which I have come as to the meaning and the very limited scope of s. 34, it is important to note that cl. 1 of the agreement expressly states that the agreement is made by virtue of s. 34 of the Act. In so far as the agreement contains what is expressly provided for by s. 34, namely, an agreement by the landowner that his land shall be subject to conditions restricting the planning, development or use thereof, it is an agreement made under s. 34 having by virtue of s. 34 a special statutory force which goes beyond the force it would have had as a mere contract. For it gets all the characteristics of a restrictive covenant, so far as enforceability by the authority is concerned. In so far as the agreement and the roads and sewers agreement, which is supplemental to it, contain other matters, s. 34 appears to me to have nothing to do with the case. I am not attempting to deal with the question as to what other considerations can validly be incorporated in a s. 34 agreement. All that I have said so far is this—and I need go no further—that it is not competent for the local authority in such an agreement to incorporate a consideration consisting, as Mr. Blain contended, of a restriction of its statutory planning powers. It may be possible to give other considerations and the agreement may be severable, but it is not necessary to go into that.

To return to the contention of the plaintiffs, it is said that the agreement must be taken to mean that if they found the authority doing anything which would operate detrimentally to them as the landowners in regard to the measure of restriction to which they had subjected themselves, they could interfere and obtain an injunction to stop it. Thus, according to Mr. Blain, the court might be asked by injunction to prevent the authority, which is given by the legislature a number of very important planning powers, from exercising any of those powers in so far as such exercise involved a departure from the provisions of this agreement. I cannot accept that view. That was the view on which the writ was drafted ; it asked for an injunction. Although the claim for an injunction is now dropped, for reasons into which I need not go, the same principle is implicit in the claim for damages, namely, that the authority has tied its hands.

I think now I should come to the actual action which it is alleged was a breach of contract by the local authority, and in order to explain that it is necessary to refer to a later Act, the Town and Country Planning (Interim Development) Act, 1943. If I may say something of a general nature, these planning statutes have proceeded by steps, and each one has been more comprehensive and more practical than its predecessors ; and, of course, the Act of 1947 is the last in the series. In the Act of 1943, s. 4, sub-s. 1, provides : "If at "any time before a scheme under the principal Act comes into "operation it appears to an interim development authority "that it is expedient, having regard to the provisions then "proposed to be included in that scheme, that any development "for which permission has been granted on an interim development application should not be carried out or completed, "or should not be carried out or completed to the extent or

" in the manner allowed by the permission, they may, by " order made with the consent of the Minister, revoke or modify " the permission to such extent as appears to them to be " necessary in that behalf." Then sub-s. 2 says: " The " Minister may give directions to any interim development " authority requiring them to submit to him for his consent " under the foregoing sub-section an order for the revocation " of any permission specified in the directions, or for the " modification thereof in such manner as may be so specified; " and if any such directions are not complied with within the " time specified therein, the Minister may himself make the " order on behalf of the authority." Then there is provision for an inquiry when there is a proposal to revoke such a permission; and under sub-s. 4 power is given in the case of revocation to the interim development authority to " pay to " any person whose property is injuriously affected thereby " any such contribution as might have been made by them " under sub-s. 4 of s. 10 of the principal Act if a fresh " application for such permission had been made by that " person." It is to be observed that that section is dealing with interim developments for which permission has been granted on an interim development application. Of course, a mere permission under s. 10 of the Act of 1932 would be nothing more than an executive licence; it would have no contractual force, but the revocation of it might clearly affect the licensee injuriously because on the faith of it he may, e.g., have incurred expense; and for that reason no doubt the legislature makes provision permitting compensation to be granted in such a case. Mr. Blain points out that the section says nothing about agreements. Basing himself on his theory as to the scope of s. 34, he says: " Here is an agreement which " by contract gives a right to a certain interim development." Sub-section 4 does not in terms provide for the cancellation of any such contract; it only provides for the cancellation of interim development permissions, that is to say, permissions granted under s. 10 of the Act of 1932; and by way of reinforcing that he calls attention to s. 10 of the Act of 1943 which provides: " No agreement made after the commencement of " this Act under s. 34 of the principal Act for restricting the " planning, development or use of any land shall have effect " unless it has been approved by the Minister." That, he says, shows that with regard to antecedent agreements, agreements made before the Act, under s. 34 they are not to be subject to the

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power of revocation. Of course, the whole of that argument of Mr. Blain's falls to the ground if his initial proposition as to the scope of s. 34 is wrong, because if the contract, in so far as it would have the effect of restricting the powers of the authority is void, then no revocation would be necessary; the authority could simply disregard those restrictions.

To round off the relevant matters of fact, the defendants took into consideration the position raised when after the war the plaintiffs in terms applied for permission to develop on the lines of the agreement. That permission, according to Mr. Blain's argument, was quite unnecessary because they had at that moment the contractual right to continue that development, and nothing the defendants could do or say could stop them. No further permission, therefore, was necessary according to that argument. Permission was in fact refused, but the defendants' town clerk quite properly pointed out that there was a complication in the position owing to the existence of the development agreement. What view was formed as to the effect of that agreement in law by the parties who prepared it and entered into it, I do not know; but the defendants might very well think twice before they went back on what appears to have been the intention of the agreement, namely, that the scheme as ultimately intended to be carried into effect should contain those restrictions and no greater restrictions. In the meanwhile a further complication had occurred. A plan called the Greater London Plan had been prepared, and was very much in the public eye and in the eye of the Ministry, and the local authorities concerned. In fact, the Minister sent to the local authorities concerned a circular calling their attention to it. This area was in the ambit of that plan, and this area was part of what is called the green belt, and certain proposed arterial roads were to run across it. Of course, if that plan were to be carried out it would be quite impossible for the houses which are mentioied in the agreement ever to be built. The two things are completely inconsistent and, according to Mr. Blain's argument, the authority would not be entitled, however much it changed its mind, to depart from the terms of this agreement. Of course, if, by virtue of overriding powers, the Minister could interfere, that would not be the fault of the authority and would not constitute any breach by it of the agreement; but the authority itself, it is said, must not do anything which would involve a departure from what was contemplated by the agreement. It seems to me obvious that the powers to revoke permissions and the overriding power of the Minister in that regard given by s. 4 of the Act of 1943 have a very sensible application, because an interim development permission might very well impede, directly or indirectly, the formulation of satisfactory schemes. An authority who had given permission to a landowner might, as a practical matter, be unable to revoke it, or to insert in the scheme any different or improved provision. Therefore it is given powers to revoke subject to compensation of a limited description. In the event of their not exercising the powers the Minister is given an overriding power to take the matter in his own hands and himself make the revocation on behalf of the authority. As I have said, Mr. Blain's remarks on this section have only any applicability if he is right on his construction of s. 34, and I might content myself with saying that, as I think he is wrong on that, this point under s. 4 does not arise. But the further point is taken that, even if he was right on his construction of s. 34, all that is being attempted to be done here is to make a revocation of a permission such as is contemplated by sub-s. 1 of s. 4 of the Act of 1943. It is said that cl. 4 (*a*) of the agreement, which expressly gives the right to interim development, is nothing more nor less than a permission under s. 10 of the Act of 1932. The fact that it is incorporated in this document with a number of other things does not make it in character anything different from a permission and, being such, it is revocable under s. 4, sub-s. 1, of the Act of 1943. The position was that an application for permission under s. 10 had been made; all the necessary formalities had been gone through. It could have been dealt with simply as a permission and granted or not by itself. That was not done. The parties were in negotiation and were discussing a variety of matters, and they incorporated the permission in this agreement. That does not, in my opinion, alter its character as a mere permission or deprive the authority of the powers, in the case of development for which permission has been granted on an interim development application, of revoking that permission.

But even if that be wrong, there is a further point. It seems to me that under cl. 4 (*a*) of the agreement on its true construction the parties have contracted that the permission shall have the same effect as a permission under s. 10 of the Act of 1932. That means, as I see it, that they agreed that the permission which is in fact incorporated in this agreement was to be no better and no worse than a permission granted under s. 10. It would have all the force and convey all the rights that such a permission would give. On the other hand, it would be subject to any defects or powers in relation to it which might exist. It is perfectly true that the power of revocation is subsequent to the agreement. If at the date of the agreement a section similar to s. 4 of the Act of 1943 had been in force, it appears to me that cl. 4 (*a*) of the agreement would necessarily have meant that the permission there given was subject to the statutory powers of revocation. I cannot see that it makes any difference that the statutory power of revocation was introduced by later Acts. I cannot construe cl. 4 (*a*) of the agreement in a way which would prevent any subsequent statutory power of revocation relevant to that type of permission as meaning that no future provision made by Parliament for the revocation of such a permission should as between these parties have effect. That appears to me to be a thing which cannot be read into the clause.

I ought to return to one matter which I forgot to mention when I was dealing with the construction of s. 34. I said that, as I understood Romer J.'s decision, he thought that s. 34 did entitle the authority to enter into agreements which would prevent it from interfering with a permission which it was supposed to have contractually granted. He said (1): " In the light of the foregoing considerations, the " effect which I attribute to cl. 3 of the agreement is accordingly " that the council, by virtue of s. 34 of the Act, contractually " debarred itself from interfering, after the scheme came into " force, with the specified method of development by requiring " the plaintiffs to pull down or alter buildings erected in conformity with that method." One of the reasons which I think, apart from the decision of Luxmoore J., led the learned judge to take that view was this consideration. He points out in his judgment that, if it was not competent to the authority to give a consideration of that kind to the willing landowner, no landowner would be willing to subject his land to such restrictions. With great respect to the learned judge, I cannot take that view. A landowner who has hanging over his head the possibility, or perhaps the probability, of a stringent scheme being introduced and made effective which would affect very seriously the development of his land, coupled with the prospect of having, it may be, to oppose the scheme, perhaps unsuccessfully, at great expense to himself, would very naturally prefer, so to speak, to meet his enemy at the gate and say to him: " I am prepared myself voluntarily to subject my land to " certain restrictions. Now let us talk about it and see if we " cannot agree." Then they come to an agreement, and the local authority accepts his offer to subject his land to those restrictions. That appears to me to be of real benefit to a landowner. Until s. 34 was passed it was impossible in law for an authority to accept such an offer in such a way as to get a permanent benefit out of it, for the very simple reason that such a restrictive covenant could not be made enforceable against the successors in title of the landowner. Now that s. 34 is passed the authority is empowered to take advantage of offers of that kind, which seems to me to open up a possibility extremely beneficial to the landowner. If may operate, of course, in another way. If, even as here, two or more adjoining landowners agree on a measure of restriction and are prepared to enter into restrictive covenants with the authority, landowner A. may think it very well worth his while to enter into such a restrictive covenant provided landowner B. is doing the same thing at the same time. By that means they can mutually provide for the protection of their land from deterioration by reason of some worse form of development on their neighbours' land which the authority would be unable to prevent without a scheme. If A. says " For the profitable development of my " land I think one house to four acres is adequate," it is obviously to his advantage if a neighbouring landowner is also prepared to enter into a similar restriction so as to keep up the character of the neighbourhood, because, if it was not for that, the neighbouring landowner of his own will, apart from some planning scheme, might develop that neighbouring land on the basis of one house to a quarter of an acre, which obviously would send down the value of the property of landowner A. It seems to me there are all kinds of practical considerations which would very well induce a landowner to enter into such an agreement, and the very fact that Parliament has thought it necessary to make proper provision for that appears to me to suggest that there was a hole, so to speak, which required stopping.

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(1) [1948] Ch. 384.

I now return to say one word with regard to the allegation of breaches. As I have said, I think the argument breaks down in limine owing to the true construction of s. 34. If the construction which I have put upon it be wrong, then it appears to me that it breaks down at the point of the construction of the agreement which either by itself is nothing more than a permission under s. 10 of the Act of 1932, or, as part of the bargain is under the express terms of cl. 4 (*a*) of the agreement, to be treated as such a permission. I have said that on that basis it is subject to all the incidents which affect such a permission including a power of revocation in the authority. That is enough to dispose of the case. The allegation that the authority had repudiated its contract is of a rather peculiar nature, at any rate on one aspect of it, because it seems to me that if the statute has given power to the authority to revoke something that it has done it cannot be said to be a breach of contract if that power is exercised. Moreover, it may be pointed out that the authority so far has not revoked, and indeed, so far as it is concerned, was prepared to mark time ; it was really the action of the Minister in calling on the authority under s. 4, sub-s. 2, of the Act of 1943 to submit for his consent an application for power to revoke, and not the action of the authority, which has led to the present position. I only refer to that because I do not wish it to be thought that I am in any way accepting the proposition that there is a repudiation, much less two effective repudiations of different characters, so as to entitle the plaintiffs, even if they were right, to sue for damages as on an anticipatory breach.

It is not necessary for me, in view of what I have said, to go into that matter, because the appeal, in my opinion, fails for the reasons which I have stated.

SOMERVELL L.J. I agree. If a planning authority wishes to put into operation the Town and Country Planning Act, 1932, the first step for it to take is to pass a resolution under s. 6. That starts the proceedings. A scheme is then prepared in draft and submitted to the Minister, and it requires his approval under s. 8. There are provisions in the schedules about laying schemes before Parliament which do not concern us. In this appeal we are concerned with the period between the passing of the resolution and the date when the scheme, or any scheme, comes finally into operation. Broadly speaking, the position in that period is that there is no legal machinery for stopping the owners developing their land in any way which seems good to them. But if they do it without the approval of the planning authority (and I will refer to the form in which approval is sought and obtained in a moment), they run the risk of having any buildings that they may put up pulled down without getting compensation. That, I think, is the combined effect of ss. 13 and 18, s. 20, sub-s. 2, and the definition of "existing building" in s. 53. If they do not wish to run that risk they must operate the machinery of s. 10, and it is on that part of the Act that this appeal in the main turns.

Section 10 provides, first of all, for the Minister making a general order with respect to the interim development of land. Such an order was made, and we were referred to one or two paragraphs in it. That order having been made, a landowner in any particular area where a resolution has been passed may apply for permission to develop his land. This permission may be granted in the form in which it is asked for, or no doubt there may be negotiations, as in this case, and the parties may agree as to modifications, while, if they do not, the planning authority has power to impose conditions. That is the broad machinery.

The facts have been fully stated by the Master of the Rolls so I need not repeat them at any length. What in fact happened here was that in this period an application for permission under s. 10 was first put in. There were then negotiations, and the parties came to what I may call a composite arrangement which is set out in the two documents before us. The plaintiffs were prepared to agree to restrictions being imposed on their land under s. 34 of the Act; that is provided for in these documents, and under that section restrictions were imposed on the land. The documents also, as it seems to me, deal with two other matters. They deal expressly with the owners' position in the interim period before a scheme came, if it ever was to come, into operation, and they also make provision by covenants as between these parties and certain other parties as to the provision of sewers, drains and roads, matters which it was contemplated no doubt in 1939 would require to be dealt with fairly soon. With regard to s. 34, I agree with what has been said by the Master of the Rolls, namely, that it is impossible to construe that section as itself empowering the planning authority to undertake, in consideration of the landowner's submission to restrictions, not to use its plannings powers, and so to fetter its discretion in respect of powers conferred on it by statute. Nor do I think that there is anything in these documents to indicate that the planning authority in question purported to enter into an undertaking of that kind. I think cl. 4 (*a*) of the development agreement on its true construction negatives any such intention. It is saying, I think, in quite plain terms that, so far as development is concerned, the owner is agreeing that he shall be in exactly the same position quoad interim development as if no s. 34 restriction had been imposed, and he had applied and obtained permission under s. 10. That is what I would have expected to find, and that, it seems to me, is what in the plainest terms one does find. On that basis the argument, as it seems to me, fails. If that is right, then when we come to the Act of 1943 the statutory powers conferred by that section on the planning authority and on the Minister plainly apply to the plaintiffs in this case. Quoad their interim development rights they either have obtained permission under s. 10 (which I think is the more probable view) or they are to be treated as being in law in exactly the same position. These words of s. 4, sub-s. 1, therefore apply: " If at any time before a scheme " under the principal Act comes into operation it appears to " an interim development authority that it is expedient, having " regard to the provisions then proposed to be included in that " scheme, that any development for which permission has " been granted on an interim development application should " not be carried out or completed to the extent or in the manner " allowed by the permission, they may, by order made with the " consent of the Minister, revoke . . . . the permission." It seems to me that the permission to develop which the plaintiffs had is permission for development which had been granted on an interim development application. It can therefore be revoked under the provisions of this section of the Act of 1943.

That to my mind disposes of this case. There was a good deal of discussion about the pleading. I failed, and still fail, to understand how anything can be made of what took place as between the plaintiffs and the planning authority in January and February, 1946. The substance of the breach alleged here, as it seems to me, is that the planning authority " gave notice " to the plaintiffs that they proposed by order made with the " consent of the Minister of Town and Country Planning to " revoke the permission to develop contained in the said " agreement referred to in para. 3 hereof." It may be that the plaintiffs would have been in some difficulty in any case from the fact that the initiative under s. 4 of the Act of 1943 was taken by the Minister, but I will deal with the matter on the substantial basis that if the local authority had bound themselves in such a way that they were not entitled in law to operate, or seek to operate, s. 4, then there would have been a prima facie claim for damages to which there might have been an answer on the exact details of the case. But once one is satisfied that the planning authority was perfectly entitled to revoke its permission, then it seems to me there is an end of the plaintiffs' claim.

I agree with what has fallen from the Master of the Rolls on the subject of the learned judge's application or construction of the decision in the *Ranelagh* case (1). For these reasons, I think that this appeal fails.

WYNN-PARRY J. I agree. In my view the case can be made to turn on the true construction of s. 34 of the Act of 1932, and the development agreement. Section 34 is concerned with agreements, but agreements only, or those parts of agrements only, which, as between a landowner and a local authority, have as their object the subjection of the land of the landowner, either permanently or for a specified period, to conditions restricting the planning, development or use thereof in any manner in which those matters might be dealt with by or under a scheme. Having regard to the rule that covenants to the effect of such conditions cannot exist *in gross*, the latter part of sub-s. 1 of s. 34 is introduced in order to allow the desired result to be achieved, notwithstanding that the proposed covenantee, the local authority in question, is not possessed of, or interested in, adjacent land; and that, I think, is the whole scope of the section. That, however, does not mean that an agreement designed inter alia to achieve a result within the scope of s. 34 must contain nothing more; but, if it does contain more, then effect must only be given under s. 34 to such part of an agreement as is within the scope of that section. Otherwise the result would be that this section, which finds its place under the heading " Supplemental provisions with respect " to schemes," could be used to by-pass the whole of the preceding provisions of the Act regarding schemes. Upon this view no difficulty arises on the construction of the development agreement. Whatever be the true scope of the earlier clauses of that agreement, which has to be read in conjunction with the sewers' agreement, I share the view that cl. 3 relates only to the period after the scheme comes into force. Clause 4 relates to the interim period, and, in my view, it introduces

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(1) [1939] Ch. 110.

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s. 10 of the Town and Country Planning Act, 1932, for all purposes, and is therefore outside the scheme of s. 34. The result is that, during the period between the date of the agreement and the expected coming into force of the scheme, the only respect in which the land was affected was that it became the subject of an interim development consent. At the date of the development agreement that consent could not be revoked, although the defendants could have refused to have it scheduled to the scheme, in which case it would have ceased to have effect. The Town and Country Planning (Interim Development) Act, 1943, by s. 4 gave a means of revoking the interim development consent. It must be open to the defendants to take advantage of this provision because s. 34 of the Act of 1932 cannot have the effect of enabling a local authority to bind itself not to exercise future statutory powers. Section 4 of the Act of 1943 was effectively brought into operation, and the interim development consent given by cl. 4 (*a*) of the development agreement revoked.

I agree that in taking part in that revocation the defendants committed no breach of the development agreement, and I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Bennett & Bennett; Lees & Co. for R. H. Wright, Town Clerk, Surbiton.*

H. C. G.

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Nov. 22, 23, 24, 25, 26, 29, 30; *Dec.* 15.

Lord Greene M.R., Somervell and Evershed L.JJ.

AKTIEBOLAGET MANUS *v.* R. J. FULLWOOD & BLAND, LIMITED.

Trade mark—Foreign company—Trade mark registered in England—Sale of milking machines stamped with mark—Export to England rendered impossible by war conditions—Non-user of mark for five years—Application to expunge the mark—Non-user due to "special "circumstances in the trade"—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 26, *sub-s.* 1 (*b*), *sub-s.* 3.

A foreign company was the proprietor of a trade mark registered in respect of "milking machines and parts thereof" and they were in the habit of manufacturing these goods bearing the mark and exporting them to England for sale there. By reason of circumstances connected with the war they were prevented from exporting these goods to England for five years or longer and an application was made under the Trade Mark Acts, 1938, s. 26, sub-s. 1 (*b*), to have the mark expunged from the register on the ground of non-user of the trade mark for five years. The company resisted the application on the ground that, by virtue of s. 26, sub-s. 3, no reliance could be placed for the purpose of sub-s. 1 (*b*) "on any "non-user of a trade mark that is shown to have been due to special "circumstances in the trade."

Held that the non-user of the trade mark was due "to special "circumstances in the trade."

Trade in the sub-section means the trade in which the proprietor of the trade mark was engaged or should be defined in this case as the trade of foreign manufacturers of milking machines dealt in on the English market. Even if it could be extended to include the trade of English manufacturers, the special circumstances need not afflict all trades equally. The impact of war conditions making impracticable the ordinary usage of international trade amounts to special circumstances in the trade.

APPEAL from Harman J.

The plaintiffs, Aktiebolaget Manus, were a company incorporated according to the law of Sweden and they manufactured in that country milking machines stamped with the name "Manus." They had a trade mark in England registered in Part B of the register in respect of "milking "machines and parts thereof," consisting substantially of the name "Manus." From 1929 until shortly before the outbreak of war in 1939, large numbers of the plaintiff's milking machines bearing the mark "Manus" were being imported into and sold in the British Isles under the said trade mark. In 1936, the defendants had been appointed sole agents for a period of five years ending on June 30, 1941, for the sale of the plaintiffs' milking machines in the British Isles. After March, 1940, the plaintiffs were unable to export their machines into this country and by an agreement, the terms of which were set out in a letter dated June 10, 1940, from the defendants' solicitors to the plaintiffs' solicitors, the plaintiffs licensed the defendants under letters patent possessed by them to manufacture and sell milking machines marked "Manus" upon payment of a royalty of 30*s*. per machine until September 6, 1941, when the letters patent expired. After the termination of the licence the defendants continued, without obtaining the leave of the plaintiffs, to manufacture and sell their milking machines marked

"Manus." On September 23, 1946, the plaintiffs having become aware of what had happened and that the defendants had applied on May 7, 1946, to have the plaintiffs' trade mark removed from the register, brought proceedings claiming an injunction to restrain the defendants from infringing the trade mark and an injunction to restrain the defendants from passing off their goods as the goods of the plaintiffs. The defendants in addition to resisting the plaintiffs' claims counterclaimed under s. 26, sub-s. 1 (*b*), of the Trade Marks Act, 1938, for an order expunging the plaintiffs' trade mark from the register on the ground that they had made no bona fide use of the trade mark for five years or longer. The plaintiffs resisted the counterclaim on the ground that by reason of the war and legislation in Sweden and England it had been commercially impossible to export their machines to this country and that these were "special circumstances in the "trade" within s. 26, sub-s. 3, of the Act (1), causing the non-user of the trade mark.

Harman J. granted the injunctions asked for and dismissed the counterclaim. The defendants appealed. The case only calls for report on the counterclaim.

Beney K.C. and *James Mould K.C.* for the defendants.
Arthian Davies K.C. and *P. Stuart Bevan* for the plaintiffs.

Dec. 15. EVERSHED L.J. read the judgment with which the other members of the court (LORD GREENE M.R. and SOMERVELL L.J.) agreed and said on the main issue raised on the counterclaim: The only real question upon the defendants' counterclaim to have the mark expunged is whether the non-user of the mark by the plaintiffs themselves from 1940 is excusable by reason of "special circumstances in the trade" within the meaning of s. 26, sub-s. 3, of the Trade Marks Act, 1938.

Beyond question the plaintiffs did not, from the inception of the licence agreement of 1940, themselves use the mark. They say, however—and this is their substantial answer to the

(1) Trade Marks Act, 1938, s. 26, sub-s. 3: "An applicant "shall not be entitled to rely for "the purpose of paragraph (*b*) "of subsection (1) . . . . of this "section on any non-use of a trade "mark that is shown to have been "due to special circumstances in "the trade and not to any in"tention not to use or to abandon "the trade mark in relation to the "goods to which the application "relates."

counterclaim—that such non-user was the direct result of the compelling circumstances of the second world war, and particularly, of the war-time legislation, both in Great Britain and Sweden, which made the import of their Swedish manufactured machines practically impossible: to which they add that their factory at Norrkoping was requisitioned by the Swedish Government from 1941 to 1944. The plaintiffs rely on these circumstances as constituting "special circumstances in the "trade" within the meaning of s. 26, sub-s. 3. It is said on the defendants' behalf that the alleged special circumstances must be circumstances affecting (and as I understand their argument affecting disadvantageously to an equal or substantially equal degree) all persons engaged "in the trade" during the relevant period: or at least must not be circumstances peculiar to a particular trader. "The trade," according to the defendants' argument, must mean the trade of all manufacturers, whether British or foreign, of machines in fact marketed in England. It was not (so ran the argument) established that the war conditions operated even to prevent all foreign manufacturers from trading in England since some had or may have had subsidiary factories in England, and, in any case, the effect of the war was, in fact, to stimulate rather than to depress the business of the English manufacturers, among whom, notably, were the defendants themselves.

It is, I think, clear that the words "the trade" in the subsection must mean the trade in which the proprietor is engaged. I should, therefore, in the present case, be disposed to define "the trade" as meaning that of foreign manufacturers of milking machines dealt in on the English market. But even if the word be extended so as to comprise also English manufacturers, I am unable to accept the defendants' argument: for though the phrase in question may or may not be apt to cover the case of a calamity suffered exclusively by a particular trader—e.g., if his factory were destroyed by fire or bombs—it is not, in my view, necessary that the "special circumstances" should be such as to afflict all traders equally or, indeed, to afflict all of them at all. It is important to my mind to note that the relevant phrase is used in contrast to that which immediately follows—"and not to any intention not to use or "to abandon the trade mark." In that context it seems to me (without attempting any precise definition) that the words must be taken to refer to circumstances which are "special" in the sense of being peculiar or abnormal and which are experienced by persons engaged in a particular trade as the result of the working of some external forces as distinct from the voluntary acts of any individual trader. According to such a test no less than (in my view) the ordinary and common-sense meaning of the words, the impact of war conditions making impracticable the ordinary usages of international trade, would amount to special circumstances in the trade: and if the non-user of his mark by a particular trader was in fact due to the effect upon his business of those conditions, then he would, in my view, be within the protection of sub-s. 3.

The case was put by Somervell L.J. in the course of the argument of the imposition of prohibitive tariffs practically effective to keep out of England altogether machines manufactured abroad. It is clear that such a tariff would strike hardest at those manufacturers who had no means of manufacturing in England and would (as it would be intended to do) immensely benefit English manufacturers. And whether or not the words " the trade " be given their widest significance, the effect of such a tariff would in my judgment amount to " special circumstances in the trade."

Mr. Mould relied strongly and naturally upon a passage in the *Columbia Gramophone* case (1), from the judgment of Lord Hanworth M.R. The passage is as follows: " Sargant J. " points out in that case," i.e., *In re James Crean & Sons, Ld.'s Trade Mark* (2), " and we agree with him that the non-user " must be due to circumstances of the trade and not to special " circumstances attaching to and belonging to the trader " personally. It must be something of a wider nature than " the latter: it must be circumstances belonging to the " trade as a whole." Reference to the judgment of Sargant J. shows, I think, clearly that the Master of the Rolls' paraphrase —particularly the last few words—went further than was justified by the language of the learned judge: and if by those last few words Lord Hanworth intended to express the view that special circumstances within the meaning of the sub-section must affect similarly every trader in the trade (a view which was unnecessary to the decision in the case before him), I respectfully think that it ought not to be followed.

In my judgment, therefore, Harman J. came on this part of the case to a correct conclusion which he expressed shortly as follows: " It was also urged that the war did not affect " everyone in the trade in the same way and therefore was not

(1) (1932) 49 R. P. C. 621, 628. (2) (1921) 38 R. P. C. 155.

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"a special circumstance in the trade: it was said that the "plaintiffs were so affected because they had not set up "business in this country while other Swedish manufacturers "of milking machines had done so. In my judgment the war "conditions were a special circumstance in the trade none the "less because these circumstances bore more hardly on some "than on others."

Appeal so far as regards counterclaim dismissed.

Solicitors: *Ernest Winterbotham & Co.; Evans, Baker & Co.*

H. C. G.

CANNON *v.* HARTLEY.

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[illegible]. 19, 22.

Settlement—Deed of separation—Covenant to settle after-acquired property—Breach of covenant—Volunteer's right to claim for damages.

A volunteer who is a party to a deed and a direct covenantee thereunder is entitled to damages for breach of a covenant contained in the deed.

By a deed of separation made on January 23, 1941, between the defendant of the first part, his wife of the second part and the plaintiff, their daughter, of the third part, the defendant covenanted, inter alia, "If and whenever during the lifetime of "the wife or the daughter the husband shall become entitled ". . . . under the will or codicil . . . . of either of his parents ". . . . to any money or property exceeding in net amount or "value 1,000*l.* he will forthwith at his own expense . . . . settle "one-half of such money or property upon trust for himself for "life and for the wife for life after his death and subject thereto "in trust for the daughter absolutely . . . ." In 1944 the defendant became entitled, subject to a prior life interest therein of his mother, to a quarter share of a fund of approximately 50,000*l.* The defendant's wife died in 1946. The defendant refused to execute a settlement in accordance with the said covenant. On a claim by the plaintiff for damages for breach of the covenant:—

Held, that the plaintiff was entitled to damages.

In re Pryce [1917] 1 Ch. 234 and *In re Kay's Settlement* [1939] 1 Ch. 329 distinguished.

ACTION.

By a deed of separation dated January 23, 1941, and made between the defendant, Bernard Charles Hartley, of the first part, Violet Hartley his wife of the second part and the plaintiff their daughter, then Joyce Violet Hartley (afterwards Mrs. Cannon) of the third part, the defendant and his wife agreed to live apart by reason of unhappy differences which had arisen between them. The deed further witnessed: "In "pursuance of the said agreement and in consideration of "the matters hereinafter appearing the husband and the wife "hereby mutually covenant with each other and declare as "follows and he hereby covenants also separately with the "daughter in the terms of cll. 4, 5, 6 and 7 hereof."

By cl. 7 the defendant covenanted: "If and whenever during "the lifetime of the wife or the daughter the husband shall "become entitled at one and the same time by gift inter vivos, "from or under the will or codicil, or on the intestacy of either "of his parents or any other person to any money or property "exceeding in net amount or value 1,000*l.* he will forthwith "at his own expense and to the satisfaction of the wife and the "daughter or the survivor of them settle one half of such "money or property upon trust for himself for life and for the "wife for life after his death and subject thereto in trust for the "daughter absolutely . . . ." By the will of his father, who died on December 3, 1944, the defendant became absolutely entitled, subject to a prior life interest therein of his mother, to a quarter share of a fund of approximately 50,000*l.* The defendant's wife died on June 23, 1946. The defendant at all times refused to execute a settlement in accordance with cl. 7, and the plaintiff (the daughter) claimed damages for breach of the said covenant. It was conceded that there was no consideration moving from the part of the plaintiff.

It was contended for the defendant, in reliance on *In re Hughes* (1) that his reversionary interest under his father's will, though admittedly worth more than 1,000*l.*, was not "money or property" within the meaning of cl. 7. Romer J. in a preliminary judgment held that the question was one of construction to be decided on the language used by the parties. In his opinion, on the language of cl. 7 of this particular document, the reversionary interest to which the defendant had become entitled was property within the meaning of that clause. *In re Hughes* (1), on which the defendant had relied, was a totally different case.

On the further question whether the covenant was enforceable by the plaintiff quoad a moiety of the defendant's reversionary interest.

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(1) [1924] 2 Ch. 356.

Baden Fuller for the defendant was asked to address the court first. This is a voluntary covenant to assign an expectancy. It is well settled that an expectancy cannot be assigned, although a purported assignment for value will be treated as a covenant to assign and specifically enforced. It is also well settled that the court will not decree specific performance of a voluntary covenant to assign property.

It is submitted that damages will not be awarded for breach of such a covenant: and for this I rely upon the observation of Eve J. in *In re Pryce* (1), discussed at length in *In re Kay* (2) by Simonds J., who did not consider that he was justified in departing in any way from that decision. The observation of Eve J. exactly covers this case. If it is suggested against me that Eve J. had in mind only the circumstance that the volunteers there concerned were not parties to the covenant, he did not say this in his judgment. To deprive beneficiaries under a trust of a right to damages merely for the technical reason that they were not parties would be inequitable and it cannot be supposed that this was the ratio decidendi of Eve J. After this lapse of time the observation of Eve J. in *In re Pryce* (1) should be followed without investigating the reason.

If it is suggested that the principle applicable is that which emerges from *Fletcher* v. *Fletcher* (3), then I rely on the distinction drawn in that case between a covenant to pay money which is perfect so that the court is merely asked to order payment of the covenanted sum, and a covenant which is not perfect. A perfect covenant is enforceable by volunteers who are not parties. But a covenant to assign property is not perfect at law, since damages are not a performance of the covenant and an order for specific performance is necessary to perfect it. *In re Pryce* (4) shows that such a covenant while still imperfected is not enforceable.

An award of damages would, in effect, compel the defendant to perform his covenant specifically, as he will make the assignment to escape liability for the damages. If damages were awarded for breach of his covenant, they could only be calculated on the basis of the defendant's expectation of life. It would be contrary to public policy if the plaintiff were allowed to give evidence as to how long the defendant, her own father, was expected to live. The damages should therefore at most be nominal.

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(1) [1917] 1 Ch. 234, 241.
(2) [1939] Ch. 329, 341.
(3) (1844) 4 Hare 67, 74, 77.
(4) [1917] 1 Ch. 234.

Pennington for the plaintiff. I concede that no consideration was given by the plaintiff and that specific performance cannot be granted. But she is entitled to damages for breach of covenant under seal. There is no fundamental difference between a covenant to pay 500*l.* at some future date, and a covenant to transfer property at a future date. If there is a breach of either covenant the common law gives the remedy of damages. The plaintiff is a party to the covenant. The cases of *In re D'Angibau* (1), *In re Plumtre's Marriage Settlement* (2), *In re Pryce* (3) and *In re Kay's Settlement* (4) have nothing to do with a case such as the present. In those cases the questions under consideration were (1.) in what circumstances persons not parties to the covenant had a right of action, and (2.) whether the trustees, who were the parties to the covenant, should take proceedings for the benefit of non-parties; and it was presupposed that the trustees themselves as covenantees had a right of action. Eve J.'s reference to the Judicature Act, 1873, in *In re Pryce* (3) means only that a person who has no right to specific performance because he is not a party to the covenant has no right to damages. The Judicature Act provided that all courts should give effect to all claims whether legal or equitable, and to the defences appropriate to the relief claimed; it did not provide that a claim for damages would not lie in a particular case merely because a claim for specific performance could not be maintained. Here the plaintiff claims the common law remedy of damages as a direct covenantee and absence of consideration is no defence to that claim.

ROMER J. The question with which I have now to deal follows on my finding that the reversionary interest to which the defendant became entitled under his father's will was caught by cl. 7 of the deed of separation. It has been argued on behalf of the defendant that the plaintiff, not having given any consideration for this covenant by her father, is not only unable to apply to a court of equity for the enforcement of the covenant by way of specific performance, but that she is also disqualified from suing at common law for damages for breach of the covenant.

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(1) (1880) 15 Ch. D. 228, 242, 246.

(2) [1910] 1 Ch. 609.

(3) [1917] 1 Ch. 234.

(4) [1939] Ch. 329.

It is, of course, well established that in such a case as this a volunteer cannot come to a court of equity and ask for relief which is peculiar to the jurisdiction of equity, viz.: specific performance; but for my part I thought it was reasonably clear that, the document being under seal, the covenantee's claim for damages would be entertained, and that is still my belief.

The matter has, I think, been a little confused by reference to cases where volunteers who are not parties to (for example) a marriage settlement have sought to obtain an indirect benefit through the medium of trustees, which they themselves could not legally obtain. It has, however, been recognized that the court (and by that I mean a court of equity) will in some cases assist persons who are not parties to a settlement, and persons who by the nature of things could not have been parties to such a settlement (for example, the children of a marriage) in an attempt to enforce the provisions of the settlement and the covenants therein contained. That was well established and recognized by the time of *In re D'Angibau* (1). The headnote of that case is: "By a settlement made on the "marriage of a lady then, and therein described as, 'an infant "'of the age of nineteen years and upwards,' it was agreed "that, after the marriage, as soon as the case would admit, "certain personal estate standing in the names of the trustees "of her father's will in which the lady would take a vested "interest on her marriage subject to an annuity for her mother's "life, should be assigned to trustees, in trust for investment "with the consent of the husband and wife, and to pay the "income to the wife for her separate use, and after her death "to her husband till bankruptcy or alienation; and then to "hold the capital on trusts for the issue of the marriage; "and, in default of such issue, in trust for such person or "persons as the wife should by deed or will appoint. The "wife appointed the fund by deed to her husband, and died "without issue, being still an infant. An action having been "brought by the trustee in the husband's bankruptcy, who was "also the legal personal representative of the wife, against the "next of kin of the wife, claiming the property: Held, by "James and Brett L.JJ. (dissentiente Cotton L.J.), affirming "the decision of Jessel M.R., that the appointment by the "wife, while still a minor, was valid. *Hearle* v. *Greenbank* (2) "commented on. Held, also, by the whole court, that whether

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(1) 15 Ch. D. 228, 242.

(2) (1749) 3 Atk. 695.

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"the appointment was valid or not, the wife's next of kin, "being volunteers, could not claim under the settlement in "opposition to her legal personal representative."

Cotton L.J. expressed himself as follows (1): "The first "question for consideration is, whether the settlement of 1874 "can be considered as a declaration of trust constituting the "relation of trustee and cestui que trust as between the "husband and his assignees on the one part, and the demurring "defendants on the other part, because if it can be so treated "effect will be given to the trusts even in favour of volunteers. "But on the construction of the settlement it is clear that the "husband never constituted himself or intended to be a trustee "of the fund. He contracts to make a settlement by transferring the fund to trustees, who were to hold it upon trust, "and the distinction between a complete voluntary trust and a "voluntary contract to create a trust is clear. If it is once "established that the settlement is not a declaration of trust, "there is, in my opinion, an answer to the contention of the "defendants that the court, at their instance, would interfere "with the legal title of the plaintiff. If the court enforces a "contract to create a trust, whether contained in a marriage "settlement or in any other instrument, it will enforce it in its "entirety. But as a rule the court will not enforce a contract "as distinguished from a trust at the instance of persons not "parties to the contract: *Colyear* v. *Countess of Mulgrave* (2). "The court would probably enforce a contract in a marriage "settlement at the instance of the children of the marriage, "but this is an exception from the general rule in favour of "those who are specially the objects of the settlement. The "demurring defendants were not parties to the contract nor "within the consideration of the marriage, and, in my opinion, "they are not entitled to enforce against the legal title of the "plaintiff the contract to create a trust contained in the "settlement."

The principles as there stated by the learned Lord Justice are, of course, well established. Considerations of that sort arose in the case of *In re Plumptre's Marriage Settlement* (3), which was a decision of Eve J.

[His Lordship read the headnote and extracts from the judgment of Eve J. (4).]

It is to be observed that the next of kin in that case were not parties to the settlement and could not have been parties to the settlement; secondly, that they were outside the consideration of the settlement and were accordingly volunteers; and, thirdly, that they were invoking the assistance of the court, or trying to invoke the assistance of the court. That case is quite clearly no authority for the proposition that a direct covenantee, although a volunteer, cannot sue for damages upon any covenant of this description.

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(1) 15 Ch. D. 228, 242.
(2) (1836) 2 Keen 81.
(3) [1910] 1 Ch. 609, 611.
(4) Ibid. 609, 616, 618.

But the defendant relies (and this appears to be the foundation of his defence) upon some observations made by Eve J. in *In re Pryce* (1), and on the subsequent decision of Simonds J. in *In re Kay's Settlement* (2). I think the point of the observations of Eve J. in *In re Pryce* (1) appear sufficiently in *In re Kay's Settlement* (2). The headnote of that case is: "A voluntary settlement executed by a spinster "contained a covenant in the usual form to settle any after-"acquired property, with certain exceptions. The settlor "afterwards married and had three children. Having become "entitled under a will to a legacy and a share of residue which "fell within the covenant, and a share in an appointed fund, "she was asked by the trustees of the settlement to settle "this property, but refused to do so: Held, on an application "by the trustees for directions, that the children, being "volunteers, had no right to enforce the covenant, and therefore "the trustees ought to be directed not to take any proceedings "to enforce the covenant, by action for damages for breach, "or otherwise."

Simonds J., after referring to the facts of the case, said at p. 338: "It is in these circumstances that the trustees have "issued this summons, making as parties to it, first, the settlor "herself and, secondly, her infant children, who are bene-"ficiaries under the settlement. But, be it observed, though "beneficiaries, her children are, for the purpose of this "settlement, to be regarded as volunteers, there being no "marriage consideration, which would have entitled them to "sue, though they are parties to this application. The "trustees ask whether, in the event which has happened of the "settlor having become entitled to certain property, they "should take proceedings against her to compel performance of "the covenant or to recover damages on her failure to imple-"ment it.

"I am bound to say that that does not seem to me to be

(1) [1917] 1 Ch. 234.

(2) [1939] Ch. 329, 338.

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"a very happy form of proceeding, though perhaps it is difficult "to see how else the trustees should act. It is to be observed "that one of the persons made a party is the very person as to "whom the trustees ask the question whether she should be "sued. She, the settlor, has appeared by Mr. Evershed and "has contended, as she was entitled to contend, that the only "question before the court was whether the trustees ought to "be directed to take such proceedings; that is to say, she "contended that the only question before the court was "precisely that question which Eve J. had to deal with "in *In re Pryce* (1). She has said that the question before me "is not primarily whether, if she were sued, such an action "would succeed (as to which she might have a defence, I know "not what), but whether, in the circumstances as they are "stated to the court, the trustees ought to be directed to take "proceedings against her.

"As to that, the argument before me has been, on behalf "of the children of the marriage, beneficiaries under the "settlement, that, although it is conceded that the trustees "could not successfully take proceedings for specific "performance of the agreements contained in the settlement, "yet they could successfully, and ought to be directed to, "take proceedings at law to recover damages for the non-"observance of the agreements contained in the settlement, "first, the covenant for further assurance of the appointed "share of the first-mentioned 20,000*l.* and, secondly, the "covenant with regard to after-acquired property. In the "circumstances I must say that I felt considerable sympathy "for the argument which was put before me by Mr. Winter-"botham on behalf of the children, that there was, at any rate, "on the evidence before the court to-day, no reason why the "trustees should not be directed to take proceedings to "recover what damages might be recoverable at law for "breach of the agreements entered into by the settlor in her "settlement. But on a consideration of *In re Pryce* (1) "it seemed to me that so far as this court was concerned the "matter was concluded and that I ought not to give any "directions to the trustees to take the suggested proceedings.

"In *In re Pryce* (1) the circumstances appear to me to "have been in no wise different from those which obtain in "the case which I have to consider. In that case there was a "marriage settlement made in 1887. It contained a covenant to settle the wife's after-acquired property. In 1904 there was a deed of gift under which certain interests in reversion belonging to the husband were assured by him absolutely to his wife. The husband was also entitled to a one-third share in certain sums appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement. The share of the 9,000*l.* fell into possession in 1891 on the death of his father, and was paid to him, unknown to the trustees of his marriage settlement, and spent. The interests given by the husband to the wife and his share of the 4,700*l.* came into possession in 1916 on the death of the husband's mother, and were outstanding in the trustees of his parent's settlement and of the deed of family arrangement respectively. The husband died in 1907, and there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, and the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will. The trustees of the marriage settlement in that case took out a summons ‘ to have it determined whether these interests and funds were caught by the provisions of the settlement, and, if so, whether they should take proceedings to enforce them.’ In those proceedings, apparently, the plaintiffs were the trustees of the marriage settlement, and the only defendant appears to have been the widow of the settlor; that is to say, there were no other parties to the proceedings to whose beneficial interest it was to argue in favour of the enforceability and enforcement of the covenant, but the trustees no doubt argued in favour of their interests, as it was their duty to do. Eve J., in a considered judgment, held that although the interests to which I have referred were caught by the covenant of the wife and the agreement by the husband respectively, yet the trustees ought not to take any steps to recover any of them. In the case of the wife's fund he said that her next of kin were volunteers, who could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the court would not give them by indirect means what they could not obtain by direct procedure; therefore he declined to direct the trustees to take proceedings either to have the covenant specifically enforced or to recover damages at law. The learned judge, as I have said, took

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(1) [1917] 1 Ch. 234.

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“time to consider his judgment. Many of the cases which have been cited to me, though not all of them apparently, were cited to him, and after deciding that no steps should be taken to enforce specific performance of the covenant he used these words: ‘The position of the wife’s fund is somewhat different, in that her next of kin would be entitled to it on her death; but they are volunteers, and although the court would probably compel fulfilment of the contract to settle at the instance of any persons within the marriage consideration—see per Cotton L.J. in *In re D’Angibau* (1)—and in their favour will treat the outstanding property as subjected to an enforceable trust—*Pullan* v. *Koe* (2)—“volunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed”: see per James L.J. in *In re D’Angibau* (1). Nor could damages be awarded either in this court, or, I apprehend, at law, where, since the Judicature Act, 1873, the same defences would be available to the defendant as would be raised in an action brought in this court for specific performance or damages.’

“That is the exact point which has been urged on me with great insistence by Mr. Winterbotham. Whatever sympathy I might feel for his argument, I am not justified in departing in any way from this decision, which is now twenty-one years old. The learned judge went on: ‘In these circumstances, seeing that the next of kin could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the settlement is not a declaration of trust constituting the relationship of trustee and cestui que trust between the defendant and the next of kin, in which case effect could be given to the trusts even in favour of volunteers, but is a mere voluntary contract to create a trust, ought the court now for the sole benefit of these volunteers to direct the trustees to take proceedings to enforce the defendant’s covenant? I think it ought not; to do so would be to give the next of kin by indirect means relief they cannot obtain by any direct procedure, and would in effect be enforcing the settlement as against the defendant’s legal right to payment and transfer from the trustees of the parents’ marriage settlement.’ It is true that in those last words the learned judge does not specifically refer to an action for damages, but it is clear that he has in

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(1) 15 Ch. D. 228, 242, 246.

(2) [1913] 1 Ch. 9.

"his mind directions both with regard to an action for specific "performance and an action to recover damages at law—or, "now, in this court. In those circumstances it appears to me "that I must follow the learned judge's decision and I must "direct the trustees not to take any steps either to compel "performance of the covenant or to recover damages through "her failure to implement it."

Now it appears to me that neither *In re Pryce* (1) nor *In re Kay's Settlement* (2) is any authority for the proposition which has been submitted to me on behalf of the defendant. In neither case were the claimants parties to the settlement in question, nor were they within the consideration of the deed. When volunteers were referred to in *In re Pryce* (1) it seems to me that what Eve J. intended to say was that they were not within the class of non-parties, if I may use that expression, to whom Cotton L.J. recognized in *In re D'Angibau* (3) that the court would afford assistance. In the present case the plaintiff, although a volunteer, is not only a party to the deed of separation but is also a direct covenantee under the very covenant upon which she is suing. She does not require the assistance of the court to enforce the covenant for she has a legal right herself to enforce it. She is not asking for equitable relief but for damages at common law for breach of covenant.

For my part, I am quite unable to regard *In re Pryce* (1), which was a different case dealing with totally different circumstances, or anything which Eve J. said therein, as amounting to an authority negativing the plaintiff's right to sue in the present case. I think that what Eve J. was pointing out in *In re Pryce* (1) was that the next of kin who were seeking to get an indirect benefit had no right to come to a court of equity because they were not parties to the deed and were not within the consideration of the deed and, similarly, they would have no right to proceed at common law by an action for damages, as the court of common law would not entertain a suit at the instance of volunteers who were not parties to the deed which was sought to be enforced, any more than the court of equity would entertain such a suit.

It was suggested to me in argument that in such a case as the present, where the covenant is to bring in after-acquired property, an action for damages for breach of that covenant

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(1) [1917] 1 Ch. 234.

(2) [1939] Ch. 329.

(3) 15 Ch. D. 228.

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is in effect the same as a suit for specific performance of a covenant to settle. I myself think that the short answer to that is that the two things are not the same at all. The plaintiff here is invoking no equitable relief; she is merely asking for monetary compensation for a breach of covenant.

It was next said that, in relation to the claim for damages, having regard to the fact that cl. 7 of the settlement contemplates that certain terms of the settlement upon which after-acquired property should be settled are in default of agreement to be decided by arbitration, an element of uncertainty is introduced into the clause which is such that the court would not, or should not, entertain a claim for damages for its breach. In my judgment, that argument is unsound, for this reason, that the beneficial interests contemplated to arise in relation to this after-acquired property are perfectly clearly set out and the only thing which had to be agreed, and in default of agreement would have to be arbitrated, was pure machinery for carrying out the beneficial interest so defined.

Finally, it was suggested to me that, inasmuch as this action is an action for damages by a daughter against her father, and as the quantum of damages must be related to the father's expectation of life, a question arises which, from reasons, as I understand it, of delicacy the court would decline to entertain. I can only describe that proposition as novel and I reject it without further comment.

I shall accordingly direct an inquiry as to the damages sustained by the plaintiff for breach by the defendant of the covenant with the plaintiff contained in cl. 7 of the deed of separation and the plaintiff will have her costs of the action, the costs of the inquiry to be reserved.

Judgment for the plaintiff.

Solicitors: *Gregory, Rowcliffe & Co.; Hopwood, Mote & Leedham-Green.*

I. G. R. M.

In re LLEWELLIN'S WILL TRUSTS.

GRIFFITHS *v.* WILCOX.

JENKINS J.

1949

Feb. 10.

Will—Trustee—Company formed by testator—Trustees of will empowered to appoint themselves directors of company—Remuneration—Whether trustees liable to account to estate.

A testator, who was a director of a company, incorporated in 1927 for the purpose of carrying on a business which he had previously carried on as sole proprietor since 1882, by his will empowered his trustees " to make such arrangements with the said company . . . . " for the appointment of my said trustees or either of them or any " other persons as a director or managing director of the said " company in my place." Two of the trustees became directors after the death of the testator and a summons was taken out by them to determine whether they were accountable to the estate for remuneration received by them as directors.

Held that on the true construction of the will they were entitled to retain the remuneration without being accountable to the estate in respect thereof.

In re Macadam [1946] Ch. 75 and *In re Gee* [1948] Ch. 284, considered.

ADJOURNED SUMMONS.

By his will dated May 13, 1930, William Maberly Llewellin appointed George Jefferson Griffiths, Reginald Griffiths and Richard Ramsey Garden, to be the executors and trustees thereof. In 1882 the testator commenced to carry on business under the name of Llewellin's Machine Company. He remained the sole proprietor of that business until 1927 and then sold it to the company which was, on July 7, 1927, incorporated under the name of Llewellin's Machine Co., Ld. He became a director on its incorporation and remained a director until his death on July 8, 1930. George Jefferson Griffiths also became a director of the company on its formation and remained a director until his death on February 27, 1938. Reginald Griffiths became a director on September 16, 1930, and Richard Ramsey Garden became a director on June 11, 1938.

By cl. 11 of his will the testator empowered his trustees to make such " arrangements with the said company . . . . for " the appointment of my said trustees or either of them or any " other persons as a director or managing director of the " said company in my place."

In 1947, Reginald George Griffiths and Richard Ramsay Garden (the present trustees of the will) took out a summons

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to determine (inter alia) whether on the true construction of the will they, as trustees thereof, were entitled to retain for their own use and benefit the remuneration and salary respectively paid to them in respect of acting as directors or managing directors of the company.

Jennings K.C. and *B. S. Tatham* for the plaintiffs. By cl. 11 of this will the trustees have been expressly authorized by the testator to appoint themselves directors of the company. When there is an authority of that kind, it carries with it the implication that they are entitled to have their remuneration. The clause would be otiose, unless it means that this power is given to the trustees to do something which they otherwise could not do—namely, take up a remunerative post in the company. The testator having authorized them to appoint themselves directors and with the knowledge of his own articles of association, must have intended them, if they appointed themselves, to receive remuneration. [They referred to *In re Macadam* (1) and *In re Gee* (2).]

J. R. C. Lee (*Danckwerts* with him) for the Attorney-General.

F. B. Alcock for another beneficiary.

W. F. Waite for the widow and two daughters of George Jefferson Griffiths. It will be observed that power is given to the trustees to appoint as directors and managing directors not only themselves but "any other persons." It could hardly be expected that "any other persons" would be induced to act without remuneration.

Michael Albery for two charitable institutions beneficially interested in the testator's estate. It is not enough for it to be shown that the testator contemplated that the trustees might receive remuneration, but it must be shown that he said in his will that they were entitled to do so. Unless the testator specifically directed that the trustees were not to be accountable they must account to the estate for the remuneration; and the clause does not exonerate them from that strict liability. The will must contain an express power and not something which rests on supposition. The clause merely empowered the trustees to appoint themselves directors and was not intended to go further than that.

JENKINS J. The question which I now have to decide is whether the trustees of the testator's will are accountable to the estate for remuneration received by them as managing director and director of a company called Llewellin's Machine Company, Ld., the bulk of the shares in which form part of the testator's estate.

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(1) [1946] Ch. 75.

(2) [1948] Ch. 284.

The general principle of equity is plain. It is, that a trustee may not profit from his trust. Thus, if a trustee of shares in a company, by virtue of the control over the company which those shares give him, gets himself appointed to the post of director or managing director, then, although his remuneration is not paid to him in respect of the trust holding but in respect of the work he does as director or managing director, yet, because he gains that emolument by virtue of the trust holding he is not entitled to retain the remuneration for his own benefit. That principle is well-settled, and I have been referred to two recent cases in which it has been discussed, namely, *In re Macadam* (1) and *In re Gee* (2).

Now far be it from me to say anything purporting to trench upon that well-established and on the whole salutary rule. For the purposes of this judgment I wholly accept the position that, unless there is anything in the testator's will entitling the trustees to retain any remuneration which they may receive as director or managing director of this company, the rule must apply; but there is no rule of equity which says that a testator, if so minded, may not provide that his trustees can hold salaried offices in companies which the testator's estate controls and receive the emoluments attached to those offices without liability to account. A testator is perfectly at liberty to include such a provision in his will if he thinks fit, and, indeed, as a matter of business it is often a very sensible provision to make.

The particular clause in this will, which is relied on as excluding the general rule to which I have referred but which is, on the other hand, said by those who oppose the trustees' right to remuneration not to be wide enough or not to be explicit enough for the purpose, is cl. 11. That clause is in these terms: "I also declare that my trustees may at their "discretion retain any investments I may have at the time of "my decease whether the same may or may not be authorized "by law as investments for trust funds without being "answerable for any loss thereby occasioned to my estate "And in particular in reference to the shares held by me in "Llewellins Machine Company Limited I empower my

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(1) [1946] Ch. 75.

(2) [1948] Ch. 284.

"trustees to retain the said shares for so long as they shall "think fit and to make such arrangements with the said "company in reference thereto and for the appointment "of my said trustees or either of them or any other persons "as a director or managing director of the said company in "my place or if thought advisable by my said trustees to dispose "of my shares in the said company or any part thereof upon "such terms and conditions as they shall think fit and if they "shall deem it necessary or advisable so to do to take such "steps as they legally can to wind up the said company."

So there one has a clause in the course of which the testator expressly provides that his trustees may make such arrangements with the company for the appointment of the testator's trustees or either of them or any other person as a director or managing director of the company in the testator's place. Those words, I think, must be construed with regard to the terms of the articles of association of the company, and the testator must be deemed to have known of the contents of those articles. I think he must be deemed, when he referred to "arrangements for the appointment of the trustees or any "other person as a director or managing director," to have meant "as a director or managing director in accordance with "the articles of association of the company."

If one looks at the articles, one finds they are articles adopting the 1908 Table "A," with modifications, and the articles dealing with remuneration, so far as material for the present purpose, are arts. 69 and 72 of that Table "A." Article 69 says: "The remuneration of the directors shall from time to "time be determined by the company in general meeting." Article 72 says: "The directors may from time to time "appoint one or more of their body to the office of managing "director or manager for such term, and at such remuneration "(whether by way of salary, or commission, or participation "in profits, or partly in one way and partly in another) as "they may think fit, and a director so appointed shall not, "while holding that office, be subject to retirement by "rotation"; and so forth.

One finds, then, that the testator has expressly empowered his trustees to make such arrangements with the company as they think fit for the appointment of themselves or any other persons to offices which, as one would expect, one finds, on reference to the articles, are offices which will or may carry remuneration. I think they can fairly be described as remunerated offices. Of course, there are cases in which directors in fact receive no remuneration, but in the present case, and in most cases, the articles empower them to receive remuneration.

What, then, is the effect of the express authority thus given by the testator to his trustees? In my judgment it cannot mean anything else, as a matter of common sense and as a matter of ordinary construction, than that the testator's trustees, notwithstanding that they are trustees, shall have power to make such arrangements as they think fit for their appointment as director or managing director, and, those being, under the terms of the articles, remunerated or potentially remunerated offices, I think the arrangements which they are empowered to make include arrangements as to the remuneration which they are to receive.

That is the construction which I place on the words, and I think that the conclusion I have reached is reinforced by the fact that the power given by the testator extends to making arrangements for the appointment of other persons as director or managing director. As pointed out by Mr. Waite, it is hardly to be expected that any other person could be induced to take office unless the arrangements made with him included some arrangement as to his remuneration. As a matter of construction, one cannot give the word "arrangements" any narrower significance where the persons appointed are to be the trustees themselves. True it is that the testator never said in express terms that the trustees, when they make arrangements for the appointment of themselves as director or managing director, are not to be liable to account to the estate for the remuneration derived from their office, but that seems to me to follow as a matter of necessary implication. In fact it seems to me to be really the main purpose achieved by inserting this provision at all.

For the reasons which I have endeavoured to state, the conclusion to which I have come is that, on the true construction of this particular will the plaintiffs, as trustees of the testator's will, or notwithstanding that they are such trustees, are entitled to arrange with the company for their appointment as managing director and director of the company, and are entitled to arrange with the company their remuneration in those capacities and to retain that remuneration for their own benefit, without being liable to account to the testator's estate. That, of course, means, the shares being held as they are, that the trustees are in the invidious position of fixing their own remuneration,

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being completely in control of the company. It follows that in this respect they are in a position in which their duty and their interest conflict, but that is the result which must inevitably ensue, where a testator empowers his trustees to be directors of and receive remuneration as directors of a company which his estate controls. The fact that the construction which I have placed on the will has that consequence is no ground, in my judgment, for my giving it any other construction.

Declaration accordingly.

Solicitors: *Peacock & Goddard; Gustavus Thompson & Sons, for Scott & Fowler, Gloucester; Joynson-Hicks & Co.; Haslewood, Hare & Co., for Veale & Co., Bristol; E. F. Turner & Sons; Treasury Solicitor.*

J. L. D.

WYNN-PARRY J.

1948

Dec. 10.

1949

Feb. 4.

In re DE BEAUJEU'S APPLICATION FOR WRIT OF ATTACHMENT AGAINST CUDLIPP.

Infants—Proceedings heard in chambers—Wards of Court—Liberty to mother to take infants out of jurisdiction to Montreal—Proceedings started by father before competent court in Montreal—Paragraph in London newspaper stating writ of habeas corpus issued in Montreal and making inaccurate statement of proceedings in English court—Application by mother for leave to issue writ of attachment against editor—Information in paragraph supplied by reputable news-agency and passed by night editor of newspaper unaware at time of proceedings in English court.

On November 15, 1948, two summonses were heard in chambers. On one, taken out by the father of the infant plaintiffs asking for directions as to custody and maintenance, the court made no order; and on the other, taken out by their mother, the court gave her liberty to remove the infants from the jurisdiction to Montreal, so that the competent court there could try the matters raised. The mother had challenged the jurisdiction of the English court but did not continue to do so at the hearing, which proceeded on the basis that there was jurisdiction and that the infants were wards of court. Pursuant to the order the mother took the infants to Montreal and the father started proceedings in the appropriate court there. On November 30, 1948, the *Daily Herald* published a paragraph under the heading

"A writ over two children." Inaccurately the paragraph stated that the jurisdiction of the English court had been challenged and that the father had been granted a decree of divorce against the mother, the fact being that it had been granted to her against him. The information set out in the paragraph had been supplied to the *Daily Herald* by a reputable news-agency and had been passed for publication by the night editor, who at that time was unaware of the proceedings before the English court.

On a motion by the mother for leave to issue a writ of attachment against the editor of the *Daily Herald* for alleged contempt of court:

Held, dismissing the motion, (1.) that the judge had a complete discretion, in proceedings involving wards of court, to allow or to forbid publication of the proceedings or of any order made therein; (2.) that (without laying down any exhaustive rule) if the court made no special direction it would prima facie be contempt of court to publish an account of proceedings in chambers relating to an infant unless the judge who had heard them gave express leave; (3.) that in some cases his permission might not be required —for example, because of the passing of time between the hearing and the publication—and that those cases would have to be dealt with as they arose and could not be made the subject of a hard and fast rule; (4.) that to publish the order made on such proceedings, or an accurate summary of it, would be a contempt only if the judge had directed that neither the order nor the summary be published; (5.) that the publication of the paragraph in the present case was not a contempt, as the court had not made any such direction; (6.) that, even had the court held that there had been contempt, the contempt would have been highly technical; (7.) that the *Daily Herald* had acted in complete good faith and that the night editor could not have known, merely by reading the information supplied, that the proceedings had been in chambers.

In re Martindale [1894] 3 Ch. 193 and *Scott* v. *Scott* [1913] A. C. 417 considered.

MOTION by applicant for leave to issue a writ of attachment against the respondent editor of a newspaper for an alleged contempt of court. The facts were stated in the written judgment of Wynn-Parry J. substantially as follows: On November 15, 1948, the court made two orders on two summonses in this matter. On the first, a summons by the applicant on this motion, the mother of the two infant plaintiffs, the court gave the applicant liberty to take the infant plaintiffs out of the jurisdiction to Montreal, on certain terms and subject to certain conditions. The applicant by her summons challenged the jurisdiction of the court over the infant plaintiffs, but at the hearing the challenge was not pressed and the matter proceeded on the basis that the infant plaintiffs were wards of the court and subject to its jurisdiction. The other summons was by the father of the infant plaintiffs for directions as to custody and maintenance. On that summons the court made no order. In accordance with the invariable practice of the court, the summonses were heard in chambers, as, so far as effective, they were concerned solely with matters relating to the interests of the infant plaintiffs. In view, however, of this motion which was heard and the judgment on which was delivered in open court, his Lordship thought it right to say that the reason why he gave leave to the applicant to take the infant plaintiffs to Canada, and why he made no order on the father's summons, was because he took the view that the proper forum for the disposal of the matters raised before him was the competent court in the Province of Quebec. Pursuant to his Lordship's order, the applicant took the infant plaintiffs to Montreal, and the necessary proceedings were started by the father before the competent court in that province. The respondent to this motion was the editor of the *Daily Herald* newspaper. In the issue of that newspaper of November 30, 1948, there appeared the following paragraph: "A writ of "habeas corpus was issued by Quebec Chief Justice Tyndale "yesterday ordering the divorced wife of Jacques de Beaujeu, "a journalist, of Forge Cottage, Penhurst, Kent, to produce "the two children of the marriage in court and justify their "retention. An earlier attempt by Mr. de Beaujeu to obtain "possession of the children failed when it was ruled that the "Chancery Division of the High Court in England lacked "jurisdiction. Mr. de Beaujeu married Juliana Becqaert in "Antwerp and obtained a divorce from the divorce committee "of the Canadian Senate." The paragraph was inaccurate in two respects. In the first place the jurisdiction of the court over the infant plaintiffs was not challenged. In the second place, the divorce between the applicant and the father of the children was obtained by the applicant against the father and not by him against her. The information contained in the paragraph in question was supplied to the *Daily Herald* by a reputable news-agency. It was passed for publication by the night editor, who at the time was not aware of the proceedings before his Lordship. The mother of the infants now moved for leave to issue a writ of attachment against the editor of the *Daily Herald* for contempt in publishing the paragraph.

Manningham-Buller K.C. and *Neil Lawson* for the applicant.

A report of proceedings with regard to a ward of court which were held in camera has been held to be a contempt of court: *In re Martindale* (1). There is a contempt of court in the present case and it does not cease to be a contempt of court merely because the editor of the *Daily Herald* did not know that the proceedings in relation to these two infants were held in camera, although it was to be expected that the editor of a newspaper of that standing might have known that they would be.

Sir Valentine Holmes K.C. and *John Davidson* for the respondent. To publish the result of the hearing of an infancy matter in chambers is a contempt of court only if the result of publishing it would be damaging to the infant's interests. Orders made in infancy matters are ultimately open to public inspection, since they go to the record office. Also, there is nothing in the rules suggesting that the public are precluded from seeing any orders that are made in chambers: and it is only in cases where the result would be damaging in the manner just mentioned that they forbid a newspaper to publish the result of proceedings in infancy cases.

But in the present case, the publication cannot possible be damaging to the infants, since it is not publication of any of the actual hearing in chambers, and it is difficult to see the object in launching this motion at all. [They referred to *Scott* v. *Scott* (2).]

1949. Feb. 4. WYNN-PARRY J. read a judgment in which he stated the facts substantially as set out above. His Lordship then continued as follows:

It is alleged that, putting aside the inaccuracies in the report, the publication of the paragraph in question was a contempt of this court because it referred to proceedings which were held in chambers, and reliance was placed on the judgment of North J. in *In re Martindale* (1). On the other hand, it was argued for the respondent editor that no contempt had been committed because all that was done was to publish a statement (inaccurate, as it turned out) of the result of the proceedings before me, and that the mere publication of such a statement does not amount to a contempt.

As I read the judgment of North J. he does not lay down that publication of an order of this court, or of the effect of such an order, is a contempt merely because the proceedings leading up

(1) [1894] 3 Ch. 193.

(2) [1913] A. C. 417, 482.

to the order were held in chambers. It is true that North J. says (1): "I cannot conceive a clearer contempt of court than "that a party concerned, or any person, should proceed forth-"with to make known to the world the very matter which the "court had deliberately, in the exercise of its discretion, "decided ought not to be published." Further, he says (2): "But, as I have already said, there was no contempt in "announcing the fact that the ward had become the wife of "*Hueffer*; the contempt was in purporting to give the public "information, though meagre, of what the judge had decided "ought not to be disclosed, by determining to hear the case "in private and excluding the public."

In neither of those passages, however, does he go so far as to say that the effect of proceedings being held in chambers is to preclude publication of the result.

In *Scott* v. *Scott* (3) Lord Shaw of Dunfermline said: "Upon "this head it is true that to the application of the general rule "of publicity there are three well-recognized exceptions which "arise out of the nature of the proceedings themselves. The "three exceptions which are acknowledged to the application "of the rule prescribing the publicity of courts of justice are, "first, in suits affecting wards; secondly, in lunacy proceedings "and, thirdly, in those cases where secrecy, as, for instance, "the secrecy of a process of manufacture or discovery or "invention—trade secrets—is of the essence of the cause. "The first two of these cases, my Lords, depend upon the "familiar principle that the jurisdiction over wards and lunatics "is exercised by the judges as representing His Majesty as "parens patriæ. The affairs are truly private affairs; the "transactions are transactions truly intra familiam; and it has "long been recognized that an appeal for the protection of the "court in the case of such persons does not involve the "consequence of placing in the light of publicity their truly "domestic affairs. The third case—that of secret processes, "inventions, documents, or the like—depends upon this: "that the rights of the subject are bound up with the preser-"vation of the secret. To divulge that to the world, under the "excuse of a report of proceedings in a court of law, would be to "destroy that very protection which the subject seeks at the "court's hands. It has long been undoubted that the right to "have judicial proceedings in public does not extend to a

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(1) [1894] 3 Ch. 193, 201.

(2) Ibid. 202.

(3) [1913] A. C. 417, 482.

" violation of that secret which the court may judicially deter-" mine to be of patrimonial value and to maintain. But I " desire to add this further observation with regard to all of " these cases, my Lords, that, when respect has thus been " paid to the object of the suit, the rule of publicity may be " resumed. I know of no principle which would entitle a court " to compel a ward to remain silent for life in regard to judicial " proceedings which occurred during his tutelage, nor a person " who was temporarily insane—after he had fully recovered " his sanity and his liberty—to remain perpetually silent with " regard to judicial proceedings which occurred during the " period of his incapacity. And even in the last case, namely, " that of trade secrets, I should be surprised to learn that any " proceedings for contempt of court could be taken against " a person for divulging what had happened in a litigation " after the secrecy or confidentiality had been abandoned " and the secrets had become public property."

In my judgment, in proceedings involving wards of court, the judge has a complete discretion to allow or forbid publication of the proceedings or any order made therein. In the absence of any special direction, I am of opinion that, prima facie, it would be a contempt of court to publish an account of proceedings relating to an infant conducted in chambers without the express permission of the judge who heard the case. I use the words " prima facie " because I do not intend to attempt to state any exhaustive rule. There may well be cases in which the permission of the judge is not required, because, for example, of the lapse of time between the hearing and the date of the publication. Such cases must be dealt with as and when they arise and, as I see it, cannot conveniently be made the subject of any hard and fast or exhaustive rule. On the other hand, I am of opinion that it would not be a contempt of court to publish the order, or an accurate summary of the order, made on such proceedings unless the judge directed that neither the order nor such summary should be published. No such direction was made by me in this case, and, in my judgment, the act complained of did not constitute a contempt of court.

That would be sufficient to dispose of the motion. I desire to add, however, that even had my conclusion been otherwise, the contempt involved would have been of the most technical character, and I find it difficult to see how it could be said to have been necessary or desirable in the interests of the infant plaintiffs to launch this motion. I am satisfied as to the good faith of the newspaper in the matter, and it is to be observed that the information supplied to it (inaccurate as it was) did no more, so far as reference to the infant plaintiffs is concerned, than refer to a challenge to the jurisdiction. Had that question been pursued, I should have adjourned the matter into court, at any rate for the purpose of giving judgment. The night editor, therefore, was not to know from a mere perusal of the information supplied by the news-agency that the proceedings referred to were not proceedings held in open court.

In the result, the motion will be dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker; Simmons & Simmons.*

K. R. A. H.

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1949

Jan. 31; Feb. 14.

In re A DEBTOR.
Ex parte THE DEBTOR *v.* DODWELL (THE TRUSTEE).

Bankruptcy—Administration of estate by trustee challenged by debtor—Duty of trustee to debtor—Locus standi of debtor—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 80, 105.

The debtor, who was adjudicated bankrupt in 1940 and was discharged in 1943, owned a very large number of small houses in and around London. Most of the property consisted of short-term leaseholds, and much of it was mortgaged. It was impossible at the time of the bankruptcy to realize the properties at a reasonable figure, and the trustee carried on the management of the properties as a business for a number of years. In 1948 the trustee had accumulated a balance of 10,000*l.* and proposed to sell the unmortgaged properties (the mortgagees having in all cases not proved but relied on their securities) in order to pay the creditors in full, including a claim for income tax relating to the years 1933 to 1939 which had been agreed and admitted at 18,000*l.* The debtor then launched a motion in which he complained of the trustee's administration and claimed relief under a number of heads, which included an injunction to restrain the trustee from selling the properties, an order removing the trustee from his office, inquiries into the trustee's remuneration and charges, an order to pay all creditors in full other than the inland revenue (whose claim the debtor purported to dispute), and an order re-vesting the properties in the debtor.

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Held that the motion must be dismissed. Although it was clear that, in accordance with the provisions of ss. 80 and 105 of the Bankruptcy Act, 1914, there must be circumstances in which the court could interfere at the instance of a bankrupt to control the actions of the trustee, they could not in the absence of fraud justify interference in the day-to-day management of the estate, nor entitle the bankrupt to question the exercise by the trustee in good faith of his discretion, nor to hold him accountable for an error of judgment.

Observations of Farwell J. in *Bird* v. *Philpott* [1900] 1 Ch. 822 at p. 828 and of Morton L.J. in *Jarrett* v. *Barclays Bank, Ld.* [1947] Ch. 187 at p. 193 applied.

In re Benoist [1909] 2 K. B. 784 referred to.

MOTION.

The bankrupt for a number of years before the outbreak of war in 1939 had been acquiring and managing house property in and around London, mostly leasehold, and a good deal of it held on short terms of years. He was, at the outbreak of war, the owner of a large number (between eight hundred and one thousand) of such properties. A substantial part of them was in mortgage to various mortgagees, but others were free from encumbrances. The outbreak of war had a disastrous effect on businesses of this character, and the bankrupt soon found himself in difficulties. He was, in fact, made bankrupt in November, 1940, on the petition of a creditor having a judgment against him in respect of dilapidations under certain leases. It was impossible in the circumstances of the time to realize an estate of this sort at anything like its proper value, and the trustee found himself obliged to carry on as a business the management of the various properties included in the estate, and he continued to do so throughout the war. The bankrupt obtained his discharge in the year 1943. No dividend had ever been paid in the bankruptcy owing to various difficulties, in particular difficulties arising out of the position between the bankrupt and the inland revenue in respect of income tax relating to the years 1933 to 1939. As a result of carrying on the business, the trustee had in his hands over 10,000*l.*, and he proposed to sell the unmortgaged part of the estate in order to provide the residue of the money necessary to pay the creditors in full, and it was this proposal which had brought about the present proceedings. None of the secured creditors proved in the bankruptcy, all of them having elected to stand on their securities. The claims of the unsecured creditors, apart from the Crown, amounted with

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interest, to about 4,000*l*. The claim of the Crown had been admitted by the trustee at a sum in the region of 18,000*l*.

By this motion the debtor sought the following relief against the trustee:

(1.) An inquiry as to the disposal by the trustee of the contents of the dwelling-house occupied at the date of the bankruptcy by the applicant and his wife.

(2.) An injunction restraining the trustee from selling or disposing of any of the property comprised in the bankrupt's estate.

(3.) An order removing the trustee from his office and appointing the official receiver in his place.

(4.) An order that the court give directions that the bankrupt be appointed as general manager of the estate.

(5.) An inquiry into the trustee's remuneration and an order of the court fixing it.

(6.) An inquiry into the costs, charges and expenses of the trustee in managing the estate and an order fixing proper charges and disallowing against the estate any excess found to have been charged.

(7.) An order directing the trustee or his substitute to pay all the creditors in full other than the commissioners of inland revenue.

Or by way of alternative:

(8.) An order re-vesting all the bankrupt's estate in him, and

(9.) Such further relief as the court thinks fit.

Lindner for the debtor. Under s. 105 the court has power to intervene to do complete justice to all concerned. Under s. 80, sub-s. 1 the bankrupt, if aggrieved, may complain of the

(1) Bankruptcy Act, 1914, s. 80: "If the bankrupt, any of the "creditors, or any other person, "is aggrieved by any act or "decision of the trustee, he may "apply to the court, and the "court may confirm, reverse, or "modify the act or decision com-"plained of, and make such order "in the premises as it thinks just."

Section 105: "Subject to the "provisions of this Act, every "court having jurisdiction in "bankruptcy under this Act shall "have full power to decide all "questions of priorities, and all "other questions whatsoever, "whether of law or fact, which "may arise in any case of bank-"ruptcy coming within the "cognizance of the court, or which "the court may deem it expedient "or necessary to decide for the "purpose of doing complete "justice or making a complete "distribution of property in any "such case."

trustee's acts to the court. Here the debtor is aggrieved against the trustee on many grounds, particularly regarding the trustee's decision to sell the properties in order to meet a liability to the revenue which should never have been admitted.

[HARMAN J. The debtor cannot appeal against an assessment agreed to by his trustee; the Crown would contend that the figure had been settled by contract.]

Under s. 105 the court has power to inquire whether the proof was properly admitted.

[HARMAN J. The court has a power to intervene, but will not do so unless it appears that the trustee has been guilty of fraud or dishonesty.]

The sections make no mention of fraud. *In re Leadbitter* (1) is only authority with reference to the Solicitors' Act, 1843; it is not a decision regarding the interest of a bankrupt in his estate under the law of bankruptcy. *Ex parte Sheffield, In re Austin* (2) was merely a decision under r. 166 of the Bankruptcy Rules, 1870 (3). Having regard to all the circumstances, the debtor is a person aggrieved and the sale of the proprties is unnecessary, and the court has jurisdiction to interfere. [He referred also to *In re Jones and Everett* (4).]

V. R. Aronson for the trustee. (He was not called on to read the evidence filed for the trustee.) The debtor has no locus standi; *Jarrett* v. *Barclays Bank, Ld.* (5); *Bird* v. *Philpott* (6). He cannot interfere in the administration of the estate; until a surplus of assets is in existence, he has no rights; he cannot claim to have matters reopened with the revenue, in the absence of fraud.

Maurice Berkeley for the Board of Inland Revenue. The claim was of long standing, and was settled with the only person who had jurisdiction to do so.

Lindner in reply.

Cur. adv. vult.

Feb. 14. HARMAN J. When the motion first came on, Mr. Aronson for the trustee immediately took the point by way of quasi-demurrer that the bankrupt had no locus standi. He said that the bankrupt could not be a "person aggrieved," so long as the bankruptcy continued, by any act of the trustee, and that his only right was to take the surplus if eventually there proved to be one, or if the trustee misconducted himself to apply to the Board of Trade under s. 95, sub-s. 2, of the Act. I was not prepared to accept this submission, and therefore evidence has been filed on both sides and the matter has been fully argued, but in the upshot I have only read the evidence-in-chief filed by the applicant because it seemed to me (for reasons which will later appear), unnecessary, having read that, to go further. As I have not read the trustee's evidence in answer, I only assume, and do not accept, the applicant's statements as true. His counsel expressly disclaimed any charge of fraud or dishonesty against the trustee, but complained that he was a "bad" trustee altogether lacking in sympathy for the applicant, and, moreover, one who took far too low a view of the bankrupt's right to have a say in the management of the estate. I ought to say in justice to the trustee that his counsel denied the applicant's charges and claimed that his evidence refuted them.

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(1) (1878) 10 Ch. D. 388.
(2) Ibid. 434.
(3) See [1870] W. N. 10.
(4) [1904] 2 Ch. 363.
(5) [1947] Ch. 187.
(6) [1900] 1 Ch. 822.

This motion, pruned of its more extravagant claims, raises a question of some importance in bankruptcy law, namely, to what extent, if any, can the bankrupt call the trustee in his bankruptcy to account for his management and disposition of the estate. The point, of course, can only arise where the bankrupt can show that there is, or will, or might (but for the trustee's action or inaction), be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Where, as in the vast majority of cases, the estate is insolvent, the bankrupt has clearly no interest in it, and it matters not to him how it is administered, but the bankrupt has a statutory right to any surplus under s. 69 of the Act, and is, therefore, clearly concerned to increase, if he can, its amount. Bankruptcy has been a part of our law for over a century, and in essence it has preserved the same principle throughout, namely, that the bankrupt is relieved of his debts and freed from oppression of his creditors, but at a price which is that he is stripped of all his property, that property vesting in a person who was originally known as the assignee, but who in more recent Acts has been described as the trustee. Under either name this person acts in the same capacity; he is, as the older Act expressed it, the assign of all the bankrupt's property. He is not a trustee of it for the bankrupt, but for the creditors, and the bankrupt till the bankruptcy process is worked out has no further interest in the assigned assets. That is the price he pays for obtaining his discharge and for being freed from the fetters of his debts. It is, in fact, the alternative to languishing indefinitely in the Fleet Prison.

It seems to me clear that there must be circumstances in which the court can interfere at the instance of a bankrupt to control the actions of the trustee: this is apparent from the terms of s. 80 itself, and is confirmed by the all-embracing language of s. 105. I need not, I think, attempt to define what these circumstances are. They cannot, I think (in the absence of fraud) justify interference in the day-to-day administration of the estate, nor entitle the bankrupt to question the exercise by the trustee in good faith of his discretion, nor to hold him accountable for an error of judgment. Administration in bankruptcy would be impossible if the trustee must answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realization of the property.

The whole of the bankrupt's property, as described in s. 38 of the Act, vests in the trustee under ss. 18 and 53, and s. 84 and the following sections show the trustee's duty as to accounts and, while creditors are given certain rights to call for accounts, no mention is made of the bankrupt. By s. 87 the trustee must file statements of account every year or oftener, and these must be audited by the Board of Trade, and it appears to me that these are the limits of the trustee's obligations so far as accounting is concerned. In other words, he is not accountable to the bankrupt except for the surplus. It is the right and duty of the trustee to realize that which vests in him to the best advantage, and it is for him alone to decide (under sub-s. 6.) with the consent of the committee of inspection how best the realization may be made. With all this notwithstanding his interest in the surplus (if any) the bankrupt is not concerned and has no right to interfere. In fact, the creditors are not his creditors; he has got rid of them and has nothing more to do with them. This is apparent when one considers the rules in the second schedule to the Act dealing with proofs. Rule 24 shows that a proof may be expunged on the application of the trustee, and under r. 26 on the application of a creditor, but it is only in cases of composition or scheme that the debtor may apply, and this point is illustrated by the case of *In re Benoist* (1).

I find support for the view of the law which I have put forward in the case of *Bird* v. *Philpott* (2). In that case Farwell J. had to consider the right of a bankrupt to assign

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(1) [1909] 2 K. B. 784.

(2) [1900] 1 Ch. 822, 828.

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the surplus in his first bankruptcy, and the question was whether the assignee of the surplus could assert his rights in priority to the trustee in a second bankruptcy. It was held that he could. Farwell J. made the following observations: "As I read the Bankruptcy Act" (that is to say, the Act of 1883 which for this purpose is the same as the present Act) "the trustee takes all the bankrupt's property for an absolute "estate in law, but for limited purposes, namely, for the "payment of the creditors under that bankruptcy, and that "bankruptcy only—payment of principal and interest, and all "the costs of the bankruptcy. Subject to that, he is a trustee "for the bankrupt of the surplus. He as a trustee is in a "better position than an ordinary trustee to the extent pointed "out in *Ex parte Sheffield, In re Austin* (1) and *In re Leadbitter* (2), that is to say, the bankrupt has not the ordinary "right of a cestui que trust to intervene until the surplus "has been ascertained to exist, and all the creditors and "interest and costs have been paid. He cannot trouble the "trustee by taxing the bill of costs or interfere with the "administration of the estate in any way, but, subject to that "and subject to his non-interference with the administration "and with the management of the trustee during the bankruptcy "in the due course of the execution of his duty, he can, in my "opinion, demand the surplus, and he has a right to the surplus "—a right which he can dispose of by will or deed or otherwise "during the pendency of the first bankruptcy, even before "the surplus is ascertained, although such disposition will, "of course, be ineffectual unless in the event there prove to be "a surplus upon which it can operate." Moreover, the recent case of *Jarrett* v. *Barclays Bank, Ld.* (3) shows that the representative of a bankrupt mortgagor has no locus standi to question a sale by the mortgagee during the currency of the bankruptcy, and Morton L.J., quoting from the judgment of Wynn-Parry J. in the court below, said as follows: "'On the "'wife's being adjudicated bankrupt, all her property passed "'to and vested in the official receiver under s. 53 of the "'Bankruptcy Act, 1914. Thereafter, only the trustee could "'deal with the property; only he could effectively complain "'against the mortgagee. The bankrupt, the wife, could "'not go behind the trustee.' The judge then referred to "*In re Leadbitter* (2) both in the High Court and in the Court "of Appeal, and proceeded: 'The mere fact that a bankrupt "'has a future interest in a possible surplus does not mean that

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(1) 10 Ch. D. 434.

(2) Ibid. 388.

(3) [1947] Ch. 187, 193.

" 'he has a present interest and there is, in my view, nothing " 'but confirmation for this proposition to be found in *Bird* v. " '*Philpott* (1), which Mr. Fortune, for the husband, cited in " 'favour of his argument '."

[His Lordship then stated the facts, and continued :]

With this premise, I turn to the relief asked for in the notice of motion. As to para. 1, the applicant desires, apparently, to reopen a transaction which was concluded in the year 1941 when the trustee sold the contents of a dwelling-house. It seems to me quite impossible at this distance of time to allow a transaction of this sort to be reopened even if there was an allegation of unfair dealing, which there is not. The bankrupt is seeking for some ammunition with which to attack the trustee after the lapse of eight years, and this I should not allow even if consistently with the principle enunciated I could do so. In my judgment, I clearly could not. It was the duty of the trustee to realize the chattels belonging to or in the apparent possession of the bankrupt, and he alone had the right to do so and to exercise his own judgment in the matter.

As to para. 2, the applicant desires to prevent a sale on two grounds, first, that the trustee has enough money in his hands already. This is clearly nonsense unless the Crown's claim is to be ignored as the bankrupt says it should be ; and, secondly, that the season chosen by the trustee is not a favourable one. As to this, it is for the trustee alone to decide when and how to realize the estate, and, in any event, the trustee, as appears by correspondence exhibited by the applicant himself, has already held his hand since May of last year to enable some practical proposal to be made by the applicant and nothing whatever has been done. I can grant no relief under this head.

As to para. 3, the applicant is labouring under some sense of grievance against the trustee, but he has in my view no right whatever to insist on his removal unless, indeed, he can exercise his statutory right under s. 95 of the Act by appealing to the Board of Trade for the trustee's removal under that section.

As to para. 4, there is a power vested in the trustee under s. 57 of the Act, with the consent of the committee of management, to employ the bankrupt in the management of the estate, but it is a long step from this to say that the court will, or, indeed, can insist on the trustee doing anything of the kind. The bankrupt alleges that his offers to manage the property

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(1) [1900] 1 Ch. 822.

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made in 1941 were rejected in circumstances which gave him personal offence and that, if he had been employed, the estate would have been better managed. Even if that be all true, the court cannot, and would not, if it could, override the decision of the trustee in a matter of this kind.

As to paras. 5 and 6, I have already pointed out that the bankrupt has no right to interfere in such matters as the trustee's remuneration or the costs, charges and expenses which he incurs unless such payments amount to misconduct with which the Board of Trade will interfere under s. 95 of the Act. Apart from that, s. 82 shows that it is for the creditors to control the remuneration and costs of the trustee, who is also subject to the scrutiny of the Board of Trade, having regard to s. 92 of the Act.

As to para. 7, this is perhaps the applicant's chief complaint. As I have said, the claims of the ordinary unsecured creditors are comparatively small. The large debt is that due to the Crown. Now this is a debt for income tax going back to the year 1933, and it has been recently agreed by the trustee with the revenue after long negotiations. With these the applicant is dissatisfied. He complains that his wishes in the matter have been disregarded and that matters ought to have been better managed. Here, again, without going into the merits of the matter, it seems to me that the complaint is an idle one. It is for the trustee and for him alone to settle with the Crown as with any other creditor, and, if in the exercise of his judgment he does so, the bankrupt has no right whatever to call his decision in question. To suggest that one class of creditors should be paid in full and that nothing be paid to another class is a negation of the whole object of bankruptcy proceedings. This seems to me to be an impudent suggestion.

As to para. 8, this again, I characterize as impudence. The applicant will regain such surplus as may be left when all the creditors have been paid. He appears, on the face of his own evidence, to have had ample time to put forward some scheme which would save his properties from sale, and he has made no concrete proposals whatever.

In the circumstances, I can only dismiss his motion with costs.

Order accordingly.

Solicitors: *Bower, Cotton & Bower*; *J. D. Langton & Passmore*; *Solicitor for Inland Revenue.*

F. R. D.

HOFFMANN *v.* FINEBERG AND OTHERS.

HARMAN J.

1948

Mar. 3, 4, 9.

Landlord and tenant—Forfeiture—Breach of covenant—Club—Conviction for gaming—Capable of remedy—Relief against forfeiture—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146.

The defendants conducted the business of a social club on premises which they held under a lease. A conviction for gaming being recorded against those managing and frequenting the club, the landlord served a notice under s. 146 of the Law of Property Act, 1925, claiming possession for breach of covenant, but he omitted to ask that the breach be remedied.

The defendants admitted the breach of covenant, but they contended that the aforesaid omission invalidated the notice. They counterclaimed for relief against forfeiture, and stated that they were willing to agree to the imposition of any conditions to remedy the breach.

Held that this breach was not capable of remedy, and the notice was therefore valid.

Rugby School (Governors) v. *Tannahill* [1935] 1 K. B. 87 and *Egerton* v. *Esplanade Hotels, London, Ld.* [1947] 2 All E. R. 88 discussed.

ACTION.

This was an action brought by the landlord, Israel Barnett Hoffmann, for the possession of certain leasehold premises known as 3, Little Somerset Street, Aldgate, on the ground of breach of covenant giving rise to a claim for forfeiture. The defendants were sued in their personal capacity and as the personal representatives of the original lessees, Lewis Elboz and David Fineberg. By a lease dated December 25, 1922, the owner of the freehold, then John Rowland Osborn granted to Elboz and Fineberg, as joint tenants, a term of eighty years, at a yearly rent of 150*l.*

By cl. 8 of the lease the lessees covenanted "Not to "exercise or carry on or permit to be exercised or carried "on in or upon any part of the said premises any noisy "offensive trade or business or do or suffer to be done "any act or thing which may be or grow to the annoyance "or damage of the landlord but may use or permit the premises "to be used for the ordinary purpose of a billiards saloon or "club including the consumption of liquors and refreshments "and holding concerts dances or other meetings on the premises "such club being carried on and conducted in a proper and "orderly manner and complying with all legal and other "necessary regulations."

The lease further contained a lessee's covenant "not to "assign or underlet the said premises . . . . except to such

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"a club or for the purposes as aforesaid without the consent "in writing of the landlord."

The lease also contained a proviso for re-entry on a breach of any of the tenants' covenants.

Under this lease the lessees carried on upon the premises the business of a proprietory social club which was called "The Somerset Hall Social Working Men's Club."

Lewis Elboz died in 1938 and David Fineberg died in 1943, and the lease was now vested in the defendants. Philip Elboz, a brother of Lewis Elboz continued to manage the club on their behalf with the assistance of one John Cohen.

In 1933 the plaintiff had acquired the fee simple of the property in reversion on the lease.

For several days prior to February 20, 1947, members of the City of London police force frequented the club, as a result of which a search warrant was issued and the police entered the club on February 20, 1947, at about 4.0 p.m. The club was crowded, and about 197 people were arrested and charged at the Mansion House the following day under ss. 1 and 3 of the Betting Act, 1853. They all pleaded guilty and were convicted.

Philip Elboz was fined 100*l.* and 25 guineas costs as being the occupier of the club to which persons resorted for the purpose of betting. Two other persons were fined 50*l.* each, a further six, including one John Cohen, 25*l.* each. The remainder were fined 6*s.* 8*d.* under an Act of Henry VIII for frequenting the club.

On March 20, 1947, the plaintiff served a notice under s. 146, sub-s. 1 of the Law of Property Act, 1925, (1) claiming

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(1) Section 146 of the Law of Property Act, 1925, provides: "(1.) A right of re-entry or "forfeiture under any proviso or "stipulation in a lease for a breach "of any covenant or condition in "the lease shall not be enforceable, "by action or otherwise, unless "and until the lessor serves on the "lessee a notice—(*a*) specifying "the breach complained of; "and (*b*) if the breach is capable "of remedy, requiring the lessee "to remedy the breach; and "in any case, requiring the lessee "to make compensation in money "for the breach; and the lessee "fails within a reasonable time "thereafter, to remedy the breach, "if it is capable of remedy, "and to make reasonable "compensation in money, to the "satisfaction of the lessor, for "the breach.

"(2.) Where a lessor is proceeding by action or otherwise, "to enforce such a right of re-"entry or forfeiture, the lessee "may, in the lessor's action . . . . "apply to the court for relief; "and the court may grant or "refuse relief, as the court, having "regard to the proceedings and "conduct of the parties . . . . "thinks fit; and in case of relief "may grant it on such terms . . . . "as the court in the circum-"stances of each case, thinks fit."

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possession on the ground that the said convictions constituted a breach of covenant involving forfeiture. He failed to ask for compensation or to ask the defendants to remedy the breach.

Ungoed-Thomas K.C. for the plaintiff. The conviction for gaming was a breach of cl. 8 of the lease giving rise to a claim for forfeiture. The covenant is in two parts, partly absolute and partly qualified: *Prothero* v. *Bell* (1). The breach of the absolute part is complete whether or not the lessees were aware of it. To constitute a breach of the qualified part, the Act relied upon must have occurred either with the knowledge of the lessees, *Barton* v. *Reed* (2), or through their agent, *Wilson* v. *Twamley* (3). There has been a breach of every part of this covenant by reason of the gaming conviction. Notwithstanding s. 146, sub-s. 1 of the Law of Property Act, it is clear that compensation need not be demanded: *Lock* v. *Pearce* (4).

The notice is not invalidated because the landlord has not asked for the breach to be remedied, as the breach is not capable of remedy (*Rugby School* (*Governors*) v. *Tannahill* (5)). If it were a breach capable of remedy, it is not denied that remedy of the breach should be demanded. For a breach to be capable of remedy within the meaning of this section, the remedy must be complete and capable of being effected completely within a reasonable time. MacKinnon J. rightly called attention in the *Tannahill* case (5) to a distinction between breaches of negative and positive covenants though in terms which were too widely expressed to be of general validity. A breach of a positive covenant directed to a physical act, like a covenant to repair generally can be remedied without difficulty, but a breach of a negative covenant directed to preserving the good name of the property, or of its owner involves imponderables which generally make it impossible for the court to say that it is capable of remedy within the section. Depreciation of the property is not essential and in this case it is not possible to remove the stigma. Under s. 146, sub-s. 2, the court can grant relief in a case where a breach is incapable of remedy, but it should be very reluctant to do so.

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(1) (1906) 22 T. L. R. 370.

(2) [1932] 1 Ch. 362.

(3) [1904] 2 K. B. 99, 105.

(4) [1893] 2 Ch. 271.

(5) [1935] 1 K. B. 87.

Maurice Berkeley for the defendants. On the evidence it must be conceded that there has been a breach of covenant. The only question for the defence is whether the breach is remediable or not. It has been suggested that breach of a negative covenant is not remediable, because one cannot actually revert to the original position, but that applies to any breach of covenant, whether positive or negative. It is too late to hold that a breach of a negative covenant cannot be remedied. It was suggested that where there had been a conviction the breach could not be remedied, but no authority for that proposition was cited. If that were the law, there would have been no need for the careful consideration given by the court in *Rugby School* (*Governors*) v. *Tannahill* (1) and *Egerton* v. *Esplanade Hotels, London, Ld.* (2), to the particular circumstances of those cases. In neither case did any judge put forward the conviction per se as the ground for his decision. The grounds of the decisions in those cases were that the value of the property was seriously affected by the breach which could not be remedied within a reasonable time.

The differences between *Rugby School* (*Governors*) v. *Tannahill* (1) and *Egerton* v. *Esplanade Hotels, London, Ld.* (2) and this case are: (1.) in those cases the premises were used for residential purposes, and here as a working-men's club; (2.) in both those cases the neighbourhoods were residential, here it was commercial and insalubrious; (3.) in both those cases the premises were used as a brothel, and here they were used merely for gaming; (4.) in the former cases the use was over a long period, here it was only during the period relating to the conviction, and there had been no other prosecutions, though the club had been in existence for over twenty years; (5.) in the former cases the court found that the value of the premises had been affected, here the evidence showed that the value of the premises would not be affected. The premises could easily be let as a factory or store, and at a much higher rent than at present.

This breach is capable of remedy if for instance there were a change of user. If the breach is capable of remedy, the lessors should have called on the lessees to remedy it: *North London Freehold Land & House Co.* v. *Jacques* (3); *Rugby School* (*Governors*), *Ld.* v. *Tannahill* (4); *Egerton* v. *Esplanade*

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(1) [1935] 1 K. B. 87.
(2) [1947] 2 All E. R. 88.
(3) (1883) 32 W. R. 283.
(4) [1935] 1 K. B. 87, 91, 94.

Hotels, London, Ld. (1). It is only where it is quite impossible to remedy a breach of covenant the landlord is absolved from calling on a lessee to do so. This may be the case where premises in a residential district have been used as a brothel.

If I am wrong on my objection to the form of notice, I counterclaim for relief against forfeiture under s. 146, sub-s. 2. The defendants did not tolerate the gambling or know about it, and did not deliberately profit from it, as in the *Esplanade Hotels'* case (1). They were not really to blame. It may be they trusted too much to Philip Elboz, but after twenty-six years without trouble, they had some excuse for so doing. Since the breach the defendants have changed the management, although the alteration in the management might have been better. (Counsel referred to Hill and Redman's Landlord and Tenant, 10th ed., pp. 430–431.) The court has unfettered power to grant relief under s. 146, sub-s. 2. The defendants ask for relief and they are willing to submit to any terms the court may think fit to impose. There should be no monetary penalty as the plaintiff has incurred no damage.

Ungoed-Thomas K.C. in reply. Where there has been a conviction for a serious criminal offence involving a breach of covenant affecting the property, the breach is not capable of remedy. The effect of the breach on the value of the premises is of importance when considering whether the breach can be remedied, although it is not the only fact. There is a definite diminution in the value of these premises on account of the conviction. The stigma of the conviction affects the property and also reflects on the landlord, and is one in respect of which he should take action. The fact that this was a bad neighbourhood does not mean that it does not matter what was done by the lessees. A person asking for relief must come to the court with clean hands. After the conviction, Cohen, one of the convicted men, was appointed as manager, on the recommendation of his previous manager, another of the convicted men. The evidence establishes that the gambling continued after the conviction.

Cur. adv. vult.

March 9, 1948. HARMAN J. having stated the facts, continued: According to the evidence of Detective-Inspector Jouning of the City of London Police who was in charge of the raid, he found seven card tables in use, at one of which bridge was being played and at six others a game called gin rummy. Round each of these six tables numbers of men were standing, and seated at each was a score recorder in addition to the other players. No money was visible on any table but the detective-inspector heard bets being laid by the bystanders, and saw these recorded by the scorers.

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(1) [1947] 2 All E. R. 88, 90, 92.

It appears that Philip Elboz was not in the club at the time of the raid. According to him he was ill in bed at his house, though this is a fact which he appears to have disclosed to nobody before entering the witness box in this action. At any rate, he arrived on the scene before the raid was over and met the detective-inspector outside. According to the detective-inspector, he said that he accepted full responsibility as occupier, and explained that the crisis (by which he meant the then existing coal shortage) was the reason why so many men were in the club. He added, according to this account, " You have " caught us fair and square, I am not complaining. There are " no dogs "—(meaning that dog-racing was prohibited)— " and the men must go somewhere. I have always tried to " run this club decent but I was weak and allowed betting to " go on. I can only plead guilty."

This account is corroborated by the report of the hearing at the Mansion House which appeared in the *Evening News* of February 21, 1947. In the witness box Mr. Philip Elboz told a different story and asserted that he had never allowed gambling, that he asked Jouning whether gambling was going on, and that he was an innocent man who took responsibility in order to save the ladies, that is to say, his wife and sisters-in-law, from embarrassment. The story appears to me to be an impudent untruth. No suggestion of the sort was made to the detective-inspector in cross-examination, and in my judgment it was a mere fabrication invented for the purposes of this case and in order to put the conviction in a less unmeritorious light. After the conviction the defendants and Mr. Philip Elboz paid all the major fines, amounting to some 450*l.*, and a family meeting was held, attended by the defendants, Mr. Philip Elboz and Mrs. Caroline Cohen, to discuss the future of the club. It was decided that Elboz could not continue as manager, and at his suggestion the defendants appointed the before mentioned John Cohen to be manager, and he has acted in that position ever since. I ought to have said that when asked what his salary was as manager Philip Elboz denied that he had a salary but said (and the defendants corroborated this) that he had remuneration of "about 3*l.* "a week." The club was obviously a profitable venture and each daughter of David Fineberg drew sums varying from 3*l.* to 1*l.* a week as her share of the takings. These takings were said to arise from table money for billiards and snooker, profits from light refreshments, card money and money paid by frequenters for counters used in playing cards. The profits have apparently been no less since the conviction than they were before.

Philip Elboz told me that there had been no gambling since the date of the conviction, but as he said the same thing about the period before the conviction, I reject this statement. It is clear that at the date of the conviction gambling of a highly organized sort was being carried on. Moreover, there were called before me two inquiry agents who were in the club for three days in February of this year, and who saw cards being played at two tables with a number of bystanders. They also saw money and counters on the tables, and one of them saw a frequenter changing counters for money with an attendant who was wearing a white coat, and was apparently one of the servants of the proprietors. In my judgment the conclusion is inevitable that gambling has throughout been conducted at this club, though perhaps lately on a smaller and more discreet scale than before. I ought to add that the detective-inspector told me that when he was last in the club, namely, in February of this year, he saw no gambling going on. He also said that this club had given the police no more trouble than others.

In the circumstances I have related I am not surprised that Mr. Berkeley on behalf of the defendants abandoned the contention that there had been no breach of covenant. He could do no otherwise. It is obvious that the first three defendants, who are the lessees, had been guilty of a breach of cl. 8 of the lease. Under this clause the premises may be used for the ordinary purposes of a club so long as it is conducted in a proper manner complying with all legal regulations. Clearly this club was not so conducted on February 20, 1947, and on any view, the lessees through their manager Mr. Elboz, to whom they left the entire control of the establishment, permitted acts to be done which were an annoyance or damage to the landlord within the meaning of the covenant.

As a matter of contract, therefore, there has been a breach permitting the landlord to re-enter, and that he claims to do in the action. The only defence is that there has been a failure to comply with s. 146 of the Law of Property Act, 1925, in that the notice given before action failed to comply with the requirements of the section. It is well settled that service of a proper notice is a condition precedent to an action for ejectment.

The terms of that section, and of its predecessor, s. 14 of the Conveyancing Act, 1881, have often been discussed, and that part of the section was well explained in the Court of Appeal by Lord Russell C.J., in the case of *Horsey Estate, Ld.* v. *Steiger* (1): "The object"—sc. of the section—"seems "to be to require in the defined cases (1.) that a notice shall "precede any proceeding to enforce a forfeiture, (2.) that the "notice shall be such as to give the tenant precise information "of what is alleged against him and what is demanded from "him, and (3.) that a reasonable time shall after notice be "allowed the tenant to act before an action is brought. The "reason is clear: he ought to have the opportunity of "considering whether he can admit the breach alleged; "whether it is capable of remedy; whether he ought to offer "any, and if so, what, compensation; and, finally, if the case "is one for relief, whether he ought or ought not promptly "to apply for such relief. In short, the notice is intended to "give to the person whose interest it is sought to forfeit the "opportunity of considering his position before an action is "brought against him."

A notice was served on March 20, 1947, by the plaintiff's solicitors, setting out the effect of cl. 8 of the lease, alleging the conviction of Philip Elboz and that the club had been carried on in breach of cl. 8. The notice did not require the lessee to remedy the breach nor demand any compensation in money. It is admitted that having regard to the decision in *Lock* v. *Pearce* (2), the latter omission did not invalidate the notice, but it is said that the former omission is fatal, and it seems to me that this contention is right if the breach is one which is capable of remedy, for the object of the section is to enable a lessee to understand with reasonable certainty what he is to do within the reasonable time allowed. It affords, as has been said, a locus pœnitentiæ.

Givers of notices under this section frequently content themselves by merely copying out the words of the section and calling upon the lessee to "remedy the breach if capable of

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(1) [1899] 2 Q. B. 79, 91. (2) [1893] 2 Ch. 271.

"remedy." Whether this form of notice is good I need not discuss, though it appears that it probably is so, having regard to the decision in *Piggott* v. *Middlesex County Council* (1). Clearly the section contemplates that some breaches are, while others are not, capable of remedy; but the cases give, I think, very little guidance as to what is "capable of remedy" within the meaning of the section. In one sense, no breach can ever be remedied, because there must always, ex concessis, be a time in which there has not been compliance with the covenant, but the section clearly involves the view that some breaches are remediable, and therefore it cannot mean that. I observe that in *Civil Service Co-operative Society, Ld.* v. *McGrigor's Trustee* (2), Russell J., held that bankruptcy was a breach which was irremediable. The point was also discussed in the case of *Rugby School* (*Governors*) v. *Tannahill* (3), where MacKinnon J., proposed a test which, if it was a good test, would be a satisfactory one. In that case the breach was a breach of a covenant not to use the premises for illegal or immoral purposes, and the notice which was served did not require any remedy for the breach. MacKinnon J. came to the conclusion that, the breach being a breach incapable of remedy, it was not necessary to demand its remedy in the notice. He says this: "The second point"—that is, the point about remedy—"has given me rather more difficulty—"namely, the contention that the notice was bad because "it did not require the lessee to remedy the breach. It is "stated that, notwithstanding the absence of a requirement "to remedy, the lessee has in fact altered her conduct, and "the house is now respectably conducted. Mr. Fearnley-"Whittingstall for the defendant says that breach of "a negative covenant can be remedied by compliance "therewith as from a certain day, and instances the breach "of a covenant not to use the premises for a children's "school, which he says can be remedied by ceasing so to use "them. At first sight this is an attractive argument, but it "has a very obvious disadvantage from the point of view "of the landlord, for, supposing the case of a breach of a "covenant not to do something and, when the landlord "complained, an immediate abstention from the user of the "premises in breach of the covenant, the landlord would be

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(1) [1909] 1 Ch. 134, 147.

(2) [1923] 2 Ch. 347.

(3) [1934] 1 K. B. 695, 700.

" deprived of any cause of action, or, if he had already begun " one, he would have it dismissed with costs. And that might " happen again and again ; the landlord would have to give a " fresh notice in each case, with the same result. On the other " hand it is quite clear that if the covenant is an affirmative " covenant to do something, e.g., to repair or to build, then if " the repairs are done or the buildings erected within a " reasonable time there is no possible danger of a renewal " of the breach. I think there is a radical distinction between " the two sorts of covenant. A promise to do a thing, if broken, " can be remedied by the thing being done. But breach of a " promise not to do a thing cannot in any true sense be " remedied ; that which was done cannot be undone. There " cannot truly be a remedy ; there can only be abstention, " perhaps accompanied with apology. I think the breach of a " negative covenant of this sort is not one ' capable of remedy ' " within the section. This does not mean that the penalty for " breach of a negative covenant is necessarily greater than " that for breach of an affirmative covenant. For the power " of the court to grant relief remains."

Now, if that remained the law, it would be attractive and easy, and one cannot but regret that when that case went to the Court of Appeal (1) the court, while agreeing that the breach there in question was a breach which was incapable of remedy, rejected the broader statement which MacKinnon J. had made.

Greer L.J. said this (1) : " In my judgment MacKinnon J. " was right in coming to the conclusion that it was not "— that is to say, it was not capable of remedy—" I think " perhaps he went further than was really necessary for the " decision of this case in holding that a breach of any negative " covenant—the doing of that which is forbidden—can never " be capable of remedy. It is unnecessary to decide the " point on this appeal ; but in some cases where the immediate " ceasing of that which is complained of, together with an " undertaking against any further breach, it might be said " that the breach was capable of remedy. This particular " breach, however—conducting the premises, or permitting " them to be conducted, as a house of ill-fame—is one which " in my judgment was not remedied by merely stopping this " user. I cannot conceive how a breach of this kind can be

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(1) [1935] 1 K. B. 87, 90, 92.

"remedied. The result of committing the breach would be "known all over the neighbourhood and seriously affect the "value of the premises. Even a money payment together "with the cessation of the improper use of the house could "not be a remedy. Taking the view as I do that this breach "was incapable of remedy, it was unnecessary to require in "the notice that the defendant should remedy the breach."

Maugham L.J. also said: "I am not prepared to go as far "as MacKinnon J. in his reasons for holding that the notice "given to the defendant was valid. The learned judge "thought that the breach of a negative covenant was incapable "of remedy. I am not satisfied that there may not be some "negative covenants with regard to which a breach may be "capable of remedy so that as to them a proper notice under "s. 146 ought to require the lessee to remedy the breach. "My ground for affirming the decision appealed from rests "upon a somewhat narrower basis." He then discusses the basis upon which he came to the same conclusion as MacKinnon J. had reached.

I am therefore deprived of the assistance that I should otherwise have had from the decision of the court of first instance in that case, and the sea is left still uncharted in consequence.

There were some further observations on the same point by Morris J. recently in the case of *Egerton* v. *Esplanade Hotels, London, Ld.* (1). In that case also the breach was the allowing of the premises to be used as a brothel. It was much the same type of breach, in fact, as in *Rugby School (Governors)* v. *Tannahill* (2), and the same conclusion was reached, namely, that the breach was not capable of remedy.

It is not very clear from the report what exactly the form of the notice was, but it appears that it did not contain any requirement that the breach should be remedied, and one of the points taken in the defence was that point. Morris J. discussed the decision in *Tannahill's* case (2) and went on to say: "The matter which I have to consider is whether, on "the facts of this case, the breach was capable of remedy. "The breach was in March. The notice was served in August, "but that, presumably, was because, after the proceedings in "court as a result of the police raid on March 11, 1945, there "were appeals, and, doubtless, the result of those appeals,

(1) [1947] 2 All E. R. 88, 91.
(2) [1935] 1 K. B. 87, 90, 92.

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"which were heard in July, was awaited before the notice was "served. In any event, no complaint is made by anyone "that the notice was not served earlier. Was this breach "a breach capable of remedy, which means a breach capable "of remedy within a reasonable time of the date in August "on which the notice was served? There were the con-"victions of two individuals, and the dismissal of their "appeals. Inevitably there would be some publicity, though "I cannot assess the amount of it in regard to those proceedings, "but, in my judgment, the breach was of such a nature that "it must cast a stigma on the premises and impose a taint "which can only be removed if those who have brought it "about are no longer associated with the premises. There "are, of course, always the beneficent effects of time in effacing "the memory of unhappy and unpleasant things, but this "was not, in my opinion, a breach which was capable of "remedy within a reasonable time. I think I am entitled, "when considering the matter, to have regard to the whole "amenity of the neighbourhood and what must be the reper-"cussions of events of this kind and their effect on property "in the neighbourhood. Under the contract, which existed "between the plaintiffs and the first defendants, the first "defendants covenanted not to use the premises in the way "in which they have used them. Merely desisting from the "wrongful user or not continuing to commit further breaches "is not, in my judgment, on the facts of this case, a way of "remedying the breach. In my view, the conclusion on this "second issue that arises is that these breaches were not "capable of remedy and that there was no necessity for the "plaintiffs to have called on the first defendant to have "remedied the breaches of which the plaintiffs complain."

It will be observed that he was very careful to say that he was going on the facts of that case only. He held that a breach which had resulted in a conviction for keeping a brothel was not capable of remedy within a reasonable time, because, I think, of the stigma that it laid on the premises and the damage that it would do to the reputation of the house. It was therefore submitted to me that one test may be that any breach involving a criminal offence is a breach which is incapable of remedy. I am not prepared to go so far. In these days the invention of criminal offences is a daily government activity, and there might in the near future, for all I know, be a criminal offence created in painting your house yellow. That is not at all impossible, although no doubt it would be in a regulation to which the public would not have any access; but I am not prepared to say that in every case a conviction for that kind of offence though it involved a breach of covenant would be an irremediable breach.

It is said on the other side that *Rugby School (Governors)* v. *Tannahill* (1) and *Egerton* v. *Esplanade Hotels, London, Ld.* (2) are distinguishable because no stigma nor diminution of value is involved in the present case. It is perfectly true that allowing gambling to go on and allowing a house to be used as a house of ill fame involve very different degrees of moral obliquity, and many people would think that there was not any very great harm, perhaps, in gin rummy; nevertheless, it is a criminal offence when played as it was here in a public place.

On the question of value there was a conflict of evidence between two witnesses, but I conclude, on the whole, that having regard to the situation of this club, to the scarcity of houses, and to the fact that it could be used as a warehouse or as a small factory if adapted to some extent, the result is that there is no substantial damage to the plaintiff. His rent is certainly amply secured on any view; there are fifty years to run of this term, and I do not think there is any question of damage to the plaintiff.

It seems to me, however, that on the facts of this case this is a breach where mere cesser is no remedy. The lessor is entitled to be protected against the slur which is involved in being said to be the landlord of a gaming house, even though no monetary damage ensue from it. The fact that gambling has ceased cannot alter the fact that the property has been used for this illegal purpose. By ceasing, the lessee merely complies with the law and prevents a further conviction; he cannot make his record clean, as he could by complying, though out of time, with a failure to lay on the prescribed number of coats of paint. I doubt whether a process of whitewashing in the moral as opposed to the physical sense can be a remedy. The breach was the condonation of a crime, and ceasing to commit it is no remedy. I hold on the facts of this case that there was no remedy within the intendment of the statute for this particular breach.

His Lordship then considered the defendants' counterclaim

(1) [1935] 1 K. B. 87.

(2) [1947] 2 All E. R. 88.

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for relief against forfeiture under s. 146, sub-s. 2 of the Law of Property Act, 1925, and held that it was not a case in which the court should grant relief.

Judgment for the plaintiff in the action; counterclaim dismissed. (a)

Solicitors for plaintiff: *Stone & Stone.*

Solicitors for the defendants: *Alexander Fine, Hawkins & Co.*

(a) The defendants appealed, but before the matter came on for hearing, the parties came to a settlement. The appeal was accordingly dismissed on February 15, 1949, no order being made as to costs.

I. G. R. M.

C. A.

1949

Feb. 11, 14, 15.

Lord Greene M.R., Somervell and Cohen L.JJ.

In re BARNATO, DECD.

JOEL *v.* SANGES

Practice—Crown proceedings—Joinder of Crown as defendant—Estate duty—Application for determination prior to possible incidence—Whether trustees accountable—Application by Crown to be struck out as defendant—Hypothetical future question not determinable by court—Finance Act, 1894 (57 & 58 *Vict., c.* 30), *s.* 8—*Finance Act,* 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 43—*Crown Proceedings Act,* 1947 (10 & 11 *Geo.* 6, *c.* 44), *ss.* 1, 13, 17 (3.), 23—*R. S. C.* 1883, *Or.* 1A, *r.* 1 (*a*), (*b*); *Or.* 16, *r.* 11, *Or.* 55, *rr.* 3, 5.

A testator by his will vested a fund in trustees who were given power with the consent of his daughter L. A. to make advancements in respect of the shares of any child of hers. Various advancements had been made and the trustees were desirous of making a further advancement to a child but they feared that they would under s. 8 of the Finance Act, 1894, be accountable to the Crown for any estate duty becoming payable under s. 43 of the Finance Act, 1940 (as amended), in the event of L. A. (who was the tenant for life of the fund) dying within five years from the date of the proposed advancement. L. A. was seventy years old. The trustees therefore took out an originating summons asking the court to determine this question and joined the Commissioners of Inland Revenue as defendants. The Commissioners applied to the court to be struck out as having been improperly joined.

Held by the Court of Appeal that neither by originating summons nor by writ (before the passing of the Crown Proceedings Act, 1947) could the plaintiffs have made the Crown a defendant, whether with permission of the Attorney-General or the Commissioners, to proceedings which only raised a purely hypothetical question that might never arise, there being no jurisdiction in the court to make a declaration in respect to such a matter.

Decision of Harman J., ante p. 21, so far as regards the actual proceedings by originating summons approved.

Dyson v. *Attorney-General* [1911] 1 K. B. 410, *Esquimalt & Nanaimo Ry. Co.* v. *Wilson* [1920] A. C. 358 and *In re Chamberlain's Settlement* [1921] 2 Ch. 533 distinguished.

In re Clay [1919] 1 Ch. 66 applied.

APPEAL from Harman J.(1).

By the will of Henry Isaacs Barnato a large legacy and other property, long since segregated from the remainder of his estate, was settled on the testator's daughter Lily Asher for a protected life interest with various remainders under which the defendants (other than the last defendant) had beneficial interests. A power of advancement was conferred upon the trustees with the consent of Mrs. Asher to her issue.

Several advancements had previously been made but the plaintiffs, as the present trustees, were now desirous of making a further advancement. Before doing so they were anxious to ascertain whether they would be accountable under s. 8 of the Finance Act, 1894, for estate duty in respect of the proposed advancement at a future date by virtue of s. 43 of the Finance Act, 1940 (as amended by the Finance Act, 1946, sch. xi. (3.)) in case Mrs. Asher, who was seventy years old, died within five years from the date of the advancement. That was a vital factor to the consideration whether they would make the advance. Before issuing an originating summons to have this matter determined, they submitted to the solicitor of Inland Revenue through their solicitors a draft of the summons and asked whether the Attorney-General should be joined. In his answer, dated March 25, 1947, the solicitor of Inland Revenue made, amongst others, the following observations: "Should the proposed advance be made, it "would seem that death of Mrs. Lily Asher would give rise "to a claim for estate duty (additional to that on the funds "retained by the trustees till her death) in respect of: (1.) any "sums advanced out of the settled legacy within the five years "immediately preceding her death . . . . the official view "is that the proposed plaintiffs to the summons will be "accountable for any estate duty payable." By the same letter he objected to the joinder of the Attorney-General.

(1) Ante p. 21.

On June 3, 1948, the plaintiffs issued an originating summons whereby they raised two questions of construction and administration in connexion with the power of advancement and the application of any sums to be advanced. In neither of these questions was the Crown in any way interested or concerned. Question 3 of the summons was as follows: "If the plaintiffs have power to and do advance "any such further sum, whether they will be accountable for "any estate duty which may become payable on such further "sum on the death of the said Lily Asher notwithstanding "that such further sum is no longer vested in them and if "so whether they ought to take any and what provision "out of such further sum or otherwise for the possibility "that such estate duty may become payable." Notwithstanding the objection of the Commissioners, the plaintiffs joined them as the last defendants to the originating summons, they having been joined to represent the Crown by virtue of s. 17, sub-s. 3, of the Crown Proceedings Act, 1947. The Inland Revenue Commissioners applied by summons under R. S. C. Or. 16, r. 11, to be struck out as having been improperly joined as parties. Harman J. held that the effect of the Crown Proceedings Act, 1947, and the rules made thereunder was to make procedure by originating summons available to the subject against the Crown in any case when it would be available between subject and subject, but that since no present claim had been made by the Crown and no interest had yet arisen in the Crown, the matter raised against the Commissioners did not fall within any of the Rules of Court authorizing procedure by originating summons and ordered the Commissioners to be struck out. The plaintiffs appealed.

Christie K.C. and *Hillaby* for the plaintiffs. The Crown Proceedings Act, 1947, enables civil proceedings to be brought against the Crown after January 1, 1948, by writ and by s. 13 these proceedings against the Crown are to be instituted and proceeded with according to the Rules of Court. Then by s. 17 it is provided that certain Government departments including the Inland Revenue Commissioners can be sued. Order 1A, r. 1 (*b*) (an order made under the Acts) provides that civil proceedings against the Crown shall, so far as may be, take the same form as civil proceedings between subject and subject and "shall, if no special form is applicable, take "the form of an action commenced by writ." Further

Or. 25, r. 3, enables proceedings for a declaratory order as to rights to be brought by way of originating summons and this procedure is thus made available against the Crown or the Government departments specified in s. 17 of the Act. Lastly, the right to bring the present proceedings in regard to question 3 is conferred by Or. 55, r. 3 (*a*) (*e*) and (*g*) of which para. (*g*) is mainly relied on as permitting a summons for the determination of any question arising in an estate or trust. Harman J. was therefore in error in holding that these proceedings could not be brought by originating summons under the Rules of Court. These proceedings could previously have been brought against the Attorney-General and can by virtue of the Crown Proceedings Act, 1947, and rules made thereunder now be brought against the Commissioners. They referred to ss. 21 and 23 of the Act.

[LORD GREENE M.R. Here there is no existing claim for estate duty, but only an hypothetical question as to the trustees' liability if a claim for duty arose within five years.]

The power to make advancements has been conferred by statute and it cannot be intended to leave trustees to make advances at the risk of their becoming personally liable for duty. There is a discretion in the court to make the declaratory order : *Dyson* v. *Attorney-General* (1).

[LORD GREENE M.R. There are two questions in the present case : the first is whether the court can deal with a case raising a purely hypothetical question, and the second whether in such a case the court can exercise a special jurisdiction and entertain against the Crown a claim for a declaration where the Crown is asserting no immediate right.]

The trustees are in the difficulty that they cannot wait till they are attacked. There is no real ground why these proceedings should not be brought by originating summons.

[LORD GREENE M.R. Are there any authorities to show that proceedings to obtain an answer to an hypothetical question can be brought at all, whether by originating summons or by writ ?]

Esquimalt and Nanaimo Ry. Co. v. *Wilson* (2), a decision of the Privy Council, shows that the fact that a question relates only to a contingency is no reason why proceedings should be set aside. By the present summons it is sought to show that the Crown will have no claim against the trustees for estate duty should it become payable in respect of a proposed

(1) [1911] 1 K. B. 410.

(2) [1920] A. C. 358.

advance owing to the death of the tenant for life within five years. That is the contingency in respect of which an answer is sought. *In re Chamberlain's Settlement* (1) is a case on similar lines. They also referred to *In re Carnarvon Harbour Acts, 1793 to 1903* (2).

What is being said in the present case is that this is not the sort of question on which the court should express an opinion. Under the Finance Act, 1894, it was only sought to tax beneficial interests and trustees were made use of merely as agents from whom the tax could be collected. The question here is whether the trustees are or are not under a liability as agents for the estate duty that will become payable if Mrs. Asher dies within five years. This is really a question whether there is a present liability to account to the Crown.

[LORD GREENE M.R. The trusteees could only be under a liability if a further event occurred and then only if the person to whom the advance was made failed to pay the tax. They are in no worse position than many persons under a contingent liability.]

There is the distinction that the trustees are not asking as to their own taxes. It is really a matter for the discretion of the court whether it will decide question 3 or not. They referred to two cases on which Harman J. relied : *In re Clay* (3) and *In re King* (4).

[SOMERVELL L.J. These are cases where it was held that hypothetical future questions ought not to be decided.]

There are future questions which the court will decide, and if so, this is one of the cases when it should be done.

Jopling for persons interested in obtaining the proposed advance. It has been suggested that the trustees are in no real difficulty as they could provide for any possible future liability for duty by means of a settlement or the obtaining of an indemnity. That does not really meet the problems of administering a power of advancement, the object of which is often to enable trustees to meet emergencies such as to costs of education, the establishing of a person in business or the payment of fees. It is true that none of these matters arise here but the question is one of general interest to many trustees and now that duties are so high trustees might often be prevented from making advances by reason of their liability

(1) [1921] 2 Ch. 533.
(2) [1937] Ch. 72.
(3) [1919] 1 Ch. 66.
(4) [1907] 1 Ch. 72.

to account under the Finance Act, 1894, s. 8, especially in view of the continuing possible liability for five years under s. 43 of the Finance Act, 1940. The question now being raised is one of immediate importance. Can this properly be said to be a hypothetical question. It is not so far as the immediate question whether an advancement should be made. If it is a hypothetical question, it is one of the kind that the court should answer seeing that it affects the administration of trusts. The Crown would be morally wrong to refuse to put the matter to the test. There is no principle involved in this case that would make a decision dangerous.

Pennycuick K.C. and *Leonard Edwards* (for *J. H. Stamp*) for the Inland Revenue Commissioners were not called upon.

COHEN L.J., who was asked by LORD GREENE M.R. to give the first judgment, said : This is an appeal from a judgment of Harman J. ordering that the names of the Commissioners of Inland Revenue be struck out, the same having been, as the learned judge found, improperly joined as defendants.

That the question raised by the summons is hypothetical is plain since no claim for duty can arise at all unless Mrs. Asher dies within the five-year period, and, if she does, the duty will only fall on the trustees if the beneficiaries to whom the advance is made do not pay it in exoneration of the trustees. Undeterred by the letter received from the solicitor to the Commissioners of Inland Revenue, the plaintiffs issued their summons and made the Commissioners a party. The Commissioners of Inland Revenue were substituted for the Attorney-General in view of the passing of the Crown Proceedings Act, 1947. [His Lordship read the first two questions asked by the summons and continued] :

I agree with the learned judge that these are questions which it is perfectly proper for the plaintiffs to ask, but I also agree with him that neither of them is a question in which the Crown is interested. If the summons were confined to these two questions, there is no doubt that the Commissioners of Inland Revenue could not properly be joined as parties, because they are not persons whose rights are sought to be affected within Or. 55, r. 5, nor would the court have ordered the Commissioners to be joined under Or. 55, r. 6. The plaintiffs, however, added a third question, namely : "If the "plaintiffs have power to and do advance any such further "sum whether they will be accountable for any estate duty "which may become payable on such further sum on the "death of the said Lily Asher notwithstanding that such "further sum is no longer vested in them and if so whether "they ought to make any and what provision out of such "further sum or otherwise for the possibility that such estate "duty may become payable." The question in the present appeal is whether that question affords a valid ground for joining the Commissioners of Inland Revenue as defendants.

Harman J. stated in the course of his judgment that the first question which arose was whether proceedings of this nature were available to the subject against the Crown. The Finance Acts make provision for appeals in respect of estate duty by dissatisfied subjects. Under the Finance Act, 1894, as amended by the Finance (1909–10) Act, 1910, an appeal was by way of petition. A simplified procedure was provided under the Administration of Justice (Miscellaneous Provisions) Act, 1933, by way of originating summons. As Harman J. pointed out, neither of these methods was available here as they apply only where the Crown's right to estate duty has already accrued. Harman J. went on to consider whether the plaintiffs were entitled to bring the Commissioners of Inland Revenue before the court to decide whether in a certain event liability would attach to them if they made the advance. Harman J. said: (1) "The plaintiffs "nevertheless, allege that there is a general right in the "subject to oblige the Crown to become a defendant to proceedings by way of originating summons not provided for "by statute, and that in fact a remedy of this sort has always "been open ever since the year 1894, though never before "resorted to. This is a bold claim, and I do not accept it. "The summary procedure by way of originating summons "is not, in my judgment (unless under the Crown Proceedings "Act, 1947, with which I will deal in a moment), available "against the Crown for the determination of a question of "liability to estate duty except in so far as is provided by the "section of the Act of 1933 already cited. There may have "been cases, for aught I know, where the Crown has been "willing to accede to the request of the subject to submit to "the jurisdiction of the court for the purpose of deciding such "a question of liability, but I do not think that the Crown "can be obliged to take this course, and indeed it would often

(1) Ante p. 25.

"be highly inconvenient that the Crown should be made a "defendant to proceedings of a domestic character between "the beneficiaries under a will or settlement simply because "the result of the answer to one of the questions might be "supposed to affect some question of liability to estate duty, "or for that matter to income tax. The plaintiffs justify "this claim on the authority of *Dyson* v. *Attorney-General* (1) "where the Court of Appeal held that a declaratory judgment "under Or. 25, r. 5, could be made against the Attorney-"General. Those, however, were proceedings by writ, and "in my judgment the decision in that case does not apply "to the summary procedure by originating summons. "Farwell L.J. in that case pointed out that when the interests "of the Crown were only indirectly affected, the old Courts "of Equity, whether the Court of Chancery or the Court of "Exchequer, did make the declaratory orders which affected "the rights of the Crown. Whether the plaintiffs would "have been in a better position if they had started the present "proceedings by writ I need not determine, but as at present "advised it seems to me that there would have been very "great difficulties in their way in framing a claim that could "not be struck out in limine. Moreover, the making of "a declaration in such proceedings was always a matter of "discretion."

With this conclusion of Harman J. I completely agree, but it would be unsatisfactory to leave the matter resting on the technical point that these proceedings cannot be taken by way of originating summons, for in that event the case might be re-started by way of writ or other proceedings and might have to be re-heard. We, therefore, invited the plaintiffs to argue on general principles. The Master of the Rolls asked Mr. Christie to cite any case in which a purely future and hypothetical question had come before the courts and the courts had held that they had jurisdiction to consider it. Mr. Christie could not put forward any such case, but founded his argument on the cases of *Dyson* v. *Attorney-General* (1), *Esquimalt and Nanaimo Railway Co.* v. *Wilson* (2) and *In re Chamberlain's Settlement* (3). In these cases either the Crown's rights might be affected by the order or the Crown was seeking to exact money or to compel the performance of an act. In *Dyson* v. *Attorney-General* (1) the matter arose in this way:

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(1) [1911] 1 K. B. 410.
(2) [1920] A. C. 358.
(3) [1921] 2 Ch. 533.

Under the Finance (1909–10) Act, 1910, a number of notices had been issued by the Commissioners of Inland Revenue requiring the person to whom they were respectively addressed to fill in a form commonly known as "Form No. 4," and notifying the addressee that unless he did so within thirty days of the date of the notice, he would be subject to a penalty not exceeding 50*l.* It, therefore, was a case in which the plaintiff found himself in the position that he would have to fill up a form which he contended he was under no liability to complete, or subject himself to the risk of incurring a penalty of 50*l.* Accordingly, he asked for a declaration under Or. 25 that he was under no obligation to comply with the notice or to furnish any of the said particulars. The court came to the conclusion that a declaratory judgment could be made against the Attorney-General representing the Crown, and that the plaintiff was not bound in such a case to proceed by petition of right. It is to be observed, as I have said, that in that case there was an immediate question to be decided between the subject and the Crown, for the Crown was seeking to compel the plaintiff to fill in the form and had threatened him with a penalty if he failed to do so. In these circumstances, the court had no hesitation in holding that they had jurisdiction to make the declaration asked for. The Master of the Rolls referred to some observations in *Pawlett and Attorney-General* (1) by Atkyns B. where the learned baron said: "The party "ought in this case to be relieved against the King, because the "King is the fountain and head of justice and equity, and it "shall not to be presumed that he will be defective in either, "it would derogate from the King's honour to imagine "that what is equity against a common person should not be "equity against him." I shall revert to this citation later in this judgment. In the case of *Esquimalt and Nanaimo Railway Co.* v. *Wilson* (2), again the right of the Crown was brought directly into issue because the plaintiff was seeking against the individual defendant a declaration which, if it had been granted, would have had the effect of depriving the Crown of the benefit of certain reservations which it had purported to make from its grant in favour of the individual defendant. Again, in *In re Chamberlain's Settlement* (3), there was an immediate question at issue. In that case Mr. Houston

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(1) (1667) Hardres' Rep. 465.
(2) [1920] A. C. 358.
(3) [1921] 2 Ch. 533.

Chamberlain who had acquired German nationality during the 1914–18 War was contending that under English law his change of nationality would not be recognized in war time, and that therefore his interest under the testator's will was not subject to the charge created by virtue of Art. 297 of the Treaty of Peace with Germany or the Treaty of Peace Order, 1919. If the charge had been created, it would vest that interest in the Custodian of Enemy Property. It is quite plain that there was an immediate question requiring decision, and that the interests of the Crown were, or might be, affected by the order which the court was being asked to make.

It seems to me that all those cases are very different from the case we have before us. In the present case, as I see it, there is no immediate question between the plaintiffs and the Crown and no justification for the suggestion that the Crown's rights will be affected if the advance which the plaintiffs are desirous of making to Mrs. Sanges is made. The right of the Crown will remain the same as it was before; that is, a right in a certain event (which may never occur) to make a demand for payment of duty. That right will in no way be affected by any order that is made on questions 1 and 2 of the summons. True it is that the trustees, if they make the advance, may not have the money in hand in the trust to meet the demand of the Crown if it is made against them under s. 8, sub-s. 4, of the Finance Act, 1894, and if it be held that the trustees are liable under that section, but the right of the Crown, whatever it is, will be just the same whether or not the advance is made. No order that the court can make will in any way affect the right of the Crown under the revenue statutes. Mr. Christie, and Mr. Jopling for Mrs. Sanges and her children, submitted that the absence of precedent was not fatal to her claim in the present case. They submitted that the matter came within the principle laid down in the passage I have cited from the judgment of Atkyns B. in *Pawlett and Attorney-General* (1). They said it was contrary to justice and equity that they should be kept in the state of uncertainty in which they are at present as to their possible liability under s. 8, sub-s. 4, of the Finance Act, 1894. That is a state, I am afraid, which often exists in the minds of the subject under the various taxing statutes. It does not seem to me that the existence of that state of uncertainty can justify us in creating the precedent of com-

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(1) Hardres' Rep. 465.

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pelling the Crown to subject itself to the decision of a purely hypothetical case which can never arise unless Mrs. Asher dies before the expiration of five years, and which may never arise, for other reasons—for instance, as the Master of the Rolls suggested in the course of the argument, if Parliament in its wisdom were in the meantime to think fit to alter the law so as to place advances of this kind in the same category as gifts and to leave the burden to rest solely on the recipient. It seems to me that if such a radical change is to be made as to compel the Crown to submit to anticipatory proceedings of this kind, such a change must be introduced by Act of Parliament and cannot properly be made by judicial decision. I would add that one of the cases to which the learned judge referred in the court below, *In re Clay* (1) seems to show that there would be no jurisdiction to make a declaratory order in a case of this kind as between subject and subject. In that case, the plaintiffs sought to obtain the decision of the court as to whether they were liable under a deed of indemnity to the defendant. No question of construction arose and the defendant had, in fact, made no claim ; all he had done was to reserve his rights, whatever they might be. The effect of the decision is, I think, sufficiently summed up in two short passages. The first from the judgment of the Master of the Rolls (2), is as follows : " And it is not open to a person, " certainly not to one against whom no claim in fact has been " made, to cut the matter short by bringing an action at his " own option, and saying : ' I wish to have it determined " ' that you have no claim whatever against me '." The second is from the judgment of Eve J. (3), and is as follows : " So soon as it was demonstrated that no specific right had " been asserted and no claim formulated, the court had, in " my opinion, no jurisdiction to deal with the petition in the " way in which it had been dealt with."

In those circumstances, it seems to me clear that neither by originating summons nor by writ before the passing of the Crown Proceedings Act, 1947, could the plaintiffs have made the Crown, whether in the person of the Attorney-General or the Commissioners of Inland Revenue, defendants to proceedings of the kind which they have now commenced. On that basis, the question whether an alteration has been effected in the law as a result of the passing of the Crown

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(1) [1919] 1 Ch. 66.

(2) Ibid. p. 78.

(3) Ibid. p. 79.

Proceedings Act, 1947, does not arise, and I will only say that I see no reason to differ from the conclusion which Harman J. reached on that point.

There is one other matter I ought to mention. Mr. Christie and Mr. Jopling submitted that it was not really a question of whether or not this was the type of case in which the court could entertain proceedings against the Crown; it was really a question of discretion. I do not think that is true; but, even if it were true, I am by no means satisfied that we ought to allow the proceedings to go on, if it was abundantly clear as, in my opinion, it is in the present case, that the court would not make a declaration after the case had been heard. I do not, however, express a concluded opinion on that point, since it is not necessary for a decision of this case. For these reasons, I think that the appeal should be dismissed.

SOMERVELL L.J.: I agree.

LORD GREENE M.R.: I agree, and only wish to add a few words. Both Mr. Christie and Mr. Jopling have argued that the question which they wished the court to decide is not a future question and is not a hypothetical question. First, it was said that the Crown has expressed an opinion that in certain events it will be entitled to make a claim. That expression of opinion Mr. Christie wished to lift into the order of things where the Crown makes a claim. The Crown has made no claim, for the very simple reason that it is not entitled to make a claim. It will be entitled to make some claim, or it may be it will think itself entitled to make a claim in the event of the tenant for life dying before the expiration of five years, but the fact that they have expressed an opinion does not, in my opinion, amount to the same thing as is present in such cases as we have been referred to where an actual instant claim by the Crown was concerned. Secondly, Mr. Jopling emphasized the fact that for the trustees this was a practical instant question, because, he said, without guidance from the court on this doubtful question, the trustees will be unable to act in the way they would like to act. Unfortunately, it is not only trustees who may find themselves in that kind of difficulty owing to the uncertain construction of some taxing Act. Any ordinary subject may find himself in precisely the same difficulty, and if these trustees could ask the court to bring the Crown here and insist upon deciding a doubtful question which

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may or may not arise between them according to events, merely because they want guidance as to the ordering of their affairs, I can see no end to the litigation that would inevitably follow. But the argument, in my opinion, is fallacious, and for this reason, that although the trustees at the moment require guidance, the question which it is suggested we ought to decide is a question as between the trustees and the Crown, and that is a purely hypothetical and future question. The fact that it is a doubtful question and may or may not arise no doubt is embarrassing for the trustees in deciding on their present course; but the actual question which we are asked to decide is a purely hypothetical and future question. The Crown will be able to put forward a claim, rightly or wrongly, in the event of the tenant for life dying before the expiration of five years, and if we were to decide this here and now, and the tenant for life were to live for more than five years, we should have given a decision binding on the Crown and effective either in favour of or against all other taxpayers, on a question which had never arisen, on a liability which had never matured; and, in my opinion, if it is desired that these courts should have power to decide hypothetical questions on the construction of taxing Acts for the guidance of the subjects of the King that ought to be done by legislation and not by this court arrogating to itself jurisdiction to do it. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Wild, Collins & Crosse; R. H. Behrend, Kendall, Price & Francis; Solicitor of Inland Revenue.*

H. C. G.

ROMER J.

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Mar. 1.

In re SILVERSTON DECD.,

WESTMINSTER BANK LD. *v.* KOHLER.

Will—Legacy to persons "in my service at the time of my death"—Supervening lunacy of testatrix—Receiver—Legacy of 500l. free of duty to Y who attested will—Effect of codicil of even date containing legacy of 500l. to Y, but omitting words "free of duty."

A testatrix, by her will dated December 21, 1944, bequeathed "free of duty to the following domestic servants if they "respectively shall be in my service at the time of my death and

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"not under notice to leave . . . . to X 500*l*. . . . . to Y 500*l*." The testatrix also bequeathed "to each of the servants indoor or "outdoor who shall have been in my or my husband's service "for three years prior to my decease . . . . the amount of one "year's wages in addition to all moneys (if any) owing to them "respectively by me or my said husband at my death." Y was one of the attesting witnesses. By a codicil of the same date, which was not attested by Y, the testatrix bequeathed "to my "maid Y if she shall be in my service at the date of my death and "not under notice to leave . . . . 500*l*. and also the amount of "one year's wages in addition to all moneys (if any) owing to her "by me at my death . . . ." and in all other respects confirmed her said will.

By an order dated March 19, 1945, a receiver of the property of the testatrix was appointed under the statute 53 Vict., c. 5, and shortly after the date of that order the testatrix was removed to a house where she could be kept under medical supervision. Her residence was sold pursuant to an order of the management and administration department. At the date of the sale X and Y were still in the employment of the testatrix. By the direction of the assistant master the receiver continued their employment in the service of the testatrix at retaining fees, but with authority to release them from performing any service to the testatrix. These retaining fees were paid until the death of the testatrix on May 31, 1948, but no services were then being performed by either of them to her.

A summons was taken out by the trustee of the will to determine whether X and Y were in the service of the testatrix at the date of her death and whether Y was entitled as well to the legacies bequeathed by the will as to those bequeathed by the codicil and whether the legacies bequeathed by the codicil were bequeathed free of duty.

Held that both X and Y were "in the service of the testatrix "at the date of her death"; that Y was entitled only to the legacies bequeathed to her by the codicil; but that these legacies were receivable by her free of legacy duty.

In re Lawson [1914] 1 Ch. 682, and *In re King* [1917] 2 Ch. 420, considered.

ORIGINATING SUMMONS.

The facts and the questions raised by the summons sufficiently appear in the head-note.

Donald Cohen for the plaintiff.

John Arnold for Annie Kohler and Rose Moody, who claimed to be entitled to the legacies. *In re Cole* (1) is the authority for the proposition that these defendants were not obliged to be in the service of the testatrix herself at the date of her death. It cannot be argued that at the death the actual employer was not the receiver. There is nothing impossible in a person employed by A. being in the service of B. [He referred to *In re Hartley's Trust* (1); *In re Lawson* (2); and *In re King* (3).] A committee has to be in charge of the patient and has to see that the patient has all he needs. The case of a receiver is different. His task is to look after the property and do what the patient would do, if she were in happier circumstances, under the direction of the court. Here the assistant master gives directions to the receiver to pay out trifling sums to these two ladies. They were, at the death of the testatrix, in her service within the meaning of the authorities and on principle. It is to be supposed that, if the testatrix had recovered, her servants would have been available ot work for her again.

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(1) [1919] Ch. 218.

E. G. Wright for another party interested.

A. H. Droop for the residuary legatees. It is difficult to argue that these two ladies were not servants of the testatrix. Plainly no notice was given and the question arises whether they technically continued in her service. Subject to the direction of the master, the receiver of a person of unsound mind acts in the interests of the patient. In the present case the object of the suspension of these two ladies was to arrange for them to be available to come back to the home. Here, however, the home was completely given up.

ROMER J. The first question which I have to decide is whether the two ladies named Annie Kohler and Rose Moody are entitled, in the events which have happened, to legacies on the footing that they were in the service of the testatrix at the date of her death.

On their behalf it is contended that, having regard to the language which the testatrix used, they qualify for their legacies. It is undisputed, that, before the making of the order appointing a receiver of the testatrix's property, they had undoubtedly been in the service of the testatrix at the house in which she then resided. It is equally plain that at her death neither of them was under notice to leave, so the point

(1) [1878] W. N. 104; 47 L. J. (Ch.) 610.
(2) [1914] 1 Ch. 682.
(3) [1917] 2 Ch. 420.

comes down to this; can it be said of them that they were in the testatrix's service at the time of her death? It is contended on their behalf by Mr. Arnold that they were under a contract of some sort at the time when the testatrix died and that that sufficiently appears on the evidence to which I have referred. The contract was one under which the receiver continued their employment at a remuneration. It is then said that, that being so, it is not a matter of materiality whether they were actually serving the testatrix at the time when she died or whether they were not, the point being that they had not left the testatrix's service, but were still in her service, although, having regard to the supervening events, they were not at the crucial time performing actual services for the testatrix. The fact that that is an irrelevant matter is shown, so Mr. Arnold says, by the case of *In re Cole* (1). Having considered that case, it is not necessary for me to refer to it in detail. I am satisfied that it justifies the view that, assuming that in other respects these ladies were in the employment of the testatrix at the time of her death, the fact that they were not actively engaged in rendering her services does not destroy their claim.

Then arises the question whether, having regard to the fact that their employment was continued by the receiver, it can be said that they were in the testatrix's service rather than in the receiver's service at the time when the testatrix died. Mr. Arnold says it is quite plain that circumstances may well arise in which a person who is in the apparent employment of one person is in the actual employment of another; for example, a lady's maid is usually paid by the lady's husband. I have been referred to three cases. The first was *In re Hartley's Trust* (2). The testatrix in that case had given a legacy to a servant named Mary Bond provided that Mary Bond remained in her service until her death. The testatrix, having made that bequest, was subsequently removed to a lunatic asylum and a few days later Mary Bond was dismissed by a relative who was managing the testatrix's affairs and who, it appeared, was ignorant of the contents of her will. On the question coming before the Vice-Chancellor whether, notwithstanding what had happened, Mary Bond could be described as being in the service of the testatrix and entitled to the legacy, he

(1) [1919] 1 Ch. 218.

(2) [1878] W. N. 104; 47 L. J. (Ch.) 610.

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held that after the order in lunacy which directed the establishment of the testatrix to be broken up the service of Mary Bond was at an end and in the circumstances he could not hold her to have been in the service of the testatrix at the time of her death.

The next case was *In re Lawson* (1), where a testator made a will in 1905 by which he bequeathed " to each of my domestic " servants who shall have been in my service for two years " prior to my decease and shall not be under notice to leave, " whether given or received, the amount of one year's wages " free of duty." The testator died in April, 1912. One of the claimants for the legacy was B., a certified male nurse and masseur who was first engaged in 1907 by the receiver in lunacy of the testator's estate as an assistant attendant on the testator, at a weekly wage of a guinea. He did not sleep in the house, but took some of his meals there. From November, 1910, till the testator's death, with one break, he was engaged on night duty, twelve hours at a time, and at a salary of two guineas a week paid every fourth week. Owing to the strain of this attendance, B. was obliged to take a holiday of four months in 1911 with the consent of the receiver, and received no salary during his absence. During his attendance he was free to undertake other work and did so to a limited extent. On a summons by the executors to determine the question whether B. was entitled to the legacy, it was held that on the true construction of the will he was a domestic servant, the term " domestic " being equivalent to " household." It was also held that although the service must be continuous for the period named, that did not involve service from day to day, and the suspension of the service, with the consent of the master, did not disentitle B. to the legacy claimed. No argument there was founded on the view that this man, having been engaged by the receiver in lunacy, could not be properly regarded as in the testator's own service. The learned judge took it as a matter of assumption that that was the true view to take and said (2) : " He was obviously a servant, " and a servant of the testator, and not the less so because " he was possessed of qualifications which enabled him, when " not actually engaged with the testator, to add to his income " by serving others." He said, towards the end of his judgment (3) : " It is true that in this case, in the circumstances

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(1) [1914] 1 Ch. 682.

(2) Ibid. 686.

(3) Ibid. 687.

"I have mentioned, no payment was made to the servant "while his absence continued, but I do not think this element "is of itself conclusive, coupled as it was with the arrangement "that he was to return to his duties as soon as his health was "restored. The result is that, in my opinion, the service "of the respondent was of such a nature as to qualify him "to claim, and I think he is entitled to be paid, a legacy as "a domestic servant of the testator." That was a case where the servant was employed by the receiver of the testator's estate.

The last case was *In re King* (1), where the servants who claimed legacies under a similar type of bequest to the one I am considering were employed not by the receiver of the testator's estate but by the committee of his person. The principal servant employed was a man called Oldfield, who was appointed by the committee, to have charge of the testator's establishment and Oldfield himself employed, as I understand it, other servants as well. The question was whether Oldfield and the servants whom he employed were entitled to legacies as being persons in the testator's service at his death. It was argued before Younger J. that there is a distinction between an appointment by the committee of the person and an appointment by the committee of the estate—that in the latter case the committee contracts in the name of the lunatic, but in the former he does not; the committee of the person is not liable to account for the allowance made to him for the maintenance of the lunatic. Younger J., delivering judgment on the question, referred to the facts and said (2): "The "question is whether any of them can claim this legacy as "being a person in the testator's service at his death. In my "opinion, they cannot. I think these persons were either "in the service of the committee of the person or, as "Mr. Austen-Cartmell suggested, in the service of the court, "and I do not think there was at the testator's death any "person who was in his service within the meaning of the codicil. "The committee of the person under a scheme in lunacy was "apparently allowed a certain sum by means of which he "was to provide for the comfort of the testator, including "in that the engagement of a proper staff of servants; and "Mr. Terrell cited an authority which shows that the committee "of the person is not liable to account for the actual disposition

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(1) [1917] 2 Ch. 420.

(2) Ibid. 424.

"of moneys placed in his hands for the purpose so long as "he discharges the duty of maintaining the lunatic, which "it is not in dispute has been properly performed in the "present case. It appears, therefore, that these persons "cannot be said to have been in the service of the lunatic "as persons either appointed or paid by him. They were in "fact paid by the committee of the person out of the money "allowed to him for that and other purposes, and were also "appointed mediately or immediately by him." He then referred to *In re Lawson* (1) and the fact that Eve J. allowed the legacy to the male nurse who was concerned in that case. Younger J. then said: "It is, however, obvious from the "report either that there were special circumstances which "enabled the judge to hold without question that the servant "in that case was in the service of the testator, or that the "point was not either taken or pressed in argument. It is "certainly not discussed in the judgment, and I do not think "that the decision of Eve J. can be considered as an authority "either one way or the other on the point which has been "now definitely argued before me. Moreover, the difference "between a receiver and the committee of the person may "be, and I think properly is for this purpose, very marked. "The answer to this question raised by the summons will "accordingly be that the bequest did not take effect in favour "of Oldfield or in favour of any of the other persons who claim "it." I have authority there that there is a distinction, in a case of the kind now under consideration, between a receiver of the estate and a committee of the person; and I have Eve J.'s authority in *In re Lawson* (1) for the view or assumption that a person who is employed by the receiver of the estate of a patient can be regarded as equivalent to an employee of the patient himself.

In those circumstances, I think Mr. Droop was fully justified in saying that it would be difficult for him to argue that these ladies in the present case do not qualify under the terms of the testatrix's bequest. I am satisfied that they do. I am satisfied that they were in the lady's service in that they were in receipt of a retaining fee, which would place them under a moral obligation, at all events, to place themselves at the disposal of the testatrix if she should regain control of her affairs and that they could, in every fair sense of the word, be regarded as being in her service. I am also satisfied that

(1) [1914] 1 Ch. 682.

the true view of the matter is that they are to be regarded as being in her service none the less in that the actual extension of their employment was effected by the receiver and not by the lady herself.

I will make a declaration that, in the events which have happened, both these ladies were in the service of the testatrix at the date of her death.

The further questions then arose whether the legacies given to Rose Moody by the codicil were cumulative or substitutional and whether they were given free of duty.

John Arnold for Rose Moody. The will was republished by the codicil. Although she could not take under the will itself, because she had attested it, the codicil by republishing the will, gives her 1,000*l.* and not merely one legacy of 500*l.* [He referred to *Anderson* v. *Anderson* (1); *Johnstone* v. *The Earl of Harrowby* (2); and to Theobald on Wills, 10th ed., p. 123.] The legacy given by the codicil is consequently free of duty also.

Droop. It is clear that the testatrix was told that the will could not take effect as regards the legacy to Rose Moody and that the codicil was therefore drawn up at once to put the mistake right. She is therefore not entitled to two legacies of 500*l.* each. The second legacy is meant to take the place of something else and to be subject to the same incidents as the original legacy of 500*l.*

ROMER J. I am quite satisfied, in this case, that the testatrix did not intend by her codicil to give an additional 500*l.* to the maid who had witnessed her will. Appreciating that the gift to Rose Moody of 500*l.* in the will was, in the words of s. 15 of the Wills Act, 1837, utterly null and void, she proceeded, by codicil on the same day, to give a legacy in its place and in all other respects confirmed the will. What I think she was confirming was the whole of the will except the void legacy of 500*l.* to Rose Moody and substituting another legacy of 500*l.* and one year's wages in place of the benefits which she had given to Rose Moody by the will. In those circumstances, I see no difficulty in holding that Rose Moody is entitled to the benefits under the codicil but not to the benefits under the will; but that she is entitled to the

(1) (1872) L. R. 13 Eq. 381.
(2) (1859) 1 De G. F. & J. 183.

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codicil benefits on the same terms as she would have been entitled to the will benefits had they been effective. I therefore declare that, according to the true construction of the codicil, the defendant Rose Moody is entitled only to the legacies bequeathed to her by the codicil, but that such legacies are free of legacy duty.

Declaration accordingly.

Solicitors: *Hicks, Arnold & Co.*

J. L. D.

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Nov. 4, 5, 8: *Dec.* 2.

YOUNG AND ANOTHER *v.* SEALEY

Trust—Joint account—Money paid by deceased into joint accounts in names of herself and defendant—Survivorship—Defendant's right to beneficial interest—Whether invalid testamentary disposition.

Money belonging to the deceased intestate was paid by her into joint banking accounts in the names of herself and her nephew, the defendant, but during her lifetime she alone made payments and withdrawals. The evidence was that she intended the beneficial, as well as the legal interest to pass on her death to the defendant, whom she had always regarded with affection. On her death intestate:—

Held, notwithstanding that the beneficial interest in the dispositions made by the deceased passed only on her death, they were not invalid by reason of failure to comply with the requirements of the Wills Act, 1837.

Beecher v. *Major* (1865) 2 Dr. & Sm. 431 and *Marshal* v. *Crutwell* (1875) L. R. 20 Eq. 328, applied.

Owens v. *Greene* [1932] I. R. 225 and *In re Reid* (1921) 50 Ont. L. R. 595 discussed.

ACTION.

The plaintiffs, Robert William Young (who died after the issue of the writ) and Charles Henry Denman were the personal representatives of Miss Teresa Elizabeth Jarman. They asked for a declaration that the defendant Wilfred Jarman Sealey was trustee for Miss Jarman's estate of certain assets, to which he had a legal title by virtue of being the surviving joint holder.

Miss Jarman died intestate on March 10, 1941, aged eighty-five. Her sole next of kin was a sister, Mrs. Mary Ann Sealey, who survived her by a few months and died on August 23,

1941. On February 26, 1942, the plaintiffs took out letters of administration to her estate. The plaintiffs were also the executors of Mrs. Sealey's will. The latter had two sons, the defendant who was now aged seventy-two, and a second son who died in 1939, leaving four children.

Prior to January, 1927, Miss Jarman had two accounts in her sole name at Fox's Branch, Taunton, of Lloyds Bank Ld. On January 6, 1927, she caused the credit balances standing to her credit on these accounts, amounting to 3,265*l.* 11*s.* 11*d.* and 1,053*l.* 18*s.* 11*d.* respectively, to be carried to a new deposit account which she opened with the same branch in the joint names of herself and the defendant. The first of the deposit books relating to this account was for the period January 6, 1927, to March 19, 1929, and above the names of Miss Jarman and the defendant on the first page appeared the words " either to draw." On January 28, 1935, Miss Jarman wrote to the defendant a letter which was, so far as material, in the following terms: " My dear Wilfred . . . . I had the " enclosed paper from the bank. They are doing this in case " anything happened then there would be no trouble either " side. We both have to sign the larger paper. You must " sign under mine. Please put your signature on the slip. " There is no immediate hurry, when you are writing again " send it back to me."

The document which Miss Jarman enclosed with this letter was a form of authority to Lloyds Bank, Ld. in the following terms: " Authority 9. For joint Credit Account (current or " deposit). To Lloyds Bank, Ld. We the undersigned " request and authorize you, until any one of us shall give you " notice in writing to the contrary: 1. To pay any moneys " now or hereafter standing to the credit of any account in our " joint names including all interest thereon to, or to the order " of, all or any one of us, or to, or to the order of, the survivors " or survivor of us or the executors or administrators of such " survivor. 2. To accept the endorsement of us or any one " of us to any cheques, drafts, orders, bills and notes payable " to us and placed to the credit of any such joint account. " Dated the 8th day of February 1935." It was in due course signed " Teresa Jarman, Wilfred Jarman Sealey." Apart from the relevant deposit books the above letter and authority were the only existing documents which threw a light upon Miss Jarman's intention with regard this account.

In addition to her accounts with Lloyds Bank, Miss Jarman also had, with the Somerset & Wilts Savings Bank, Taunton, a deposit account on " ordinary Department " and another deposit account on " special Investment Department." On January 31, 1927, Miss Jarman and the defendant signed the following declaration, addressed to the Somerset & Wilts Savings Bank, Taunton: " Declaration as to Joint Account. " No. 382. To the Trustees and Managers of the Somerset " Savings Bank. We the undersigned Teresa Jarman and " Wilfred J. Sealey Taunton and Walthamstow do hereby " jointly and severally declare and agree that our account " in the Books of the Somerset Savings Bank No. A432 shall " be a joint account, and that all moneys now or hereafter to " be deposited in the said Bank to the credit of the said account, " shall upon presentation of the passbook, be repayable to " either of us or to the Written Order of either of us, and in " the case of death to the survivor of us. And we hereby " jointly and severally undertake, to hold the Trustees and " Managers of the said Bank harmless; and indemnified " against all claims and demands that may hereafter be made " against them or the said Savings Bank in respect of any " payment made against our said Account in pursuance of " the foregoing authority and instructions. Dated this " 31st day of January 1927." That was signed by the defendant and Miss Jarman, and witnessed. The account referred to in this document as No. A432 was the account which Miss Jarman had on Special Investment Department, but it was conceded for the plaintiff that the declaration must be taken to cover both accounts which Miss Jarman then had, although the account on " ordinary Department " was not expressly mentioned.

Apart from the above transactions Miss Jarman from time to time purchased certain investments in the joint names of herself and one or more of her great-nephews and great-nieces, and she made one such purchase in the names of herself and the defendant.

Miss Jarman drew freely on the Lloyds account and made many payments into it; at her death the balance standing to the credit thereof was 575*l*.-odd. She made few payments in, or withdrawals from the Somerset & Wilts Savings Bank accounts, and the balances at her death were about 871*l*. on the one account, and 3,624*l*. on the other. The defendant never made any payments into the accounts, or withdrew anything from them.

The evidence was that Miss Jarman was somewhat eccentric and very secretive over money matters, and that she wished to avoid payment of income tax. The defendant said that he had known Miss Jarman from his childhood, and that she had always been fond of him. He was born in Taunton (where Miss Jarman lived) but had spent most of his life in London. He visited her at Taunton throughout his life at varying intervals of time. He heard about the joint accounts for the first time when she wrote to him in 1927, telling him that she had opened the joint accounts for his ultimate benefit, and that she had done it in this manner to avoid paying death duties, and to prevent her solicitors from knowing anything about it. About 1927, or the year following Miss Jarman confirmed this in a conversation with the defendant, whom she then saw every one or two years. In a letter of January 28, 1935, she enclosed an authority for him to sign in relation to one of the joint accounts. She repeated her intention that the moneys on the joint accounts were to belong to him on her death.

The plaintiffs claimed that there was a resulting trust in favour of Miss Jarman's estate of moneys in the joint accounts and of certain shares in a building society. The defendant claimed that Miss Jarman had intended him to be beneficially entitled to them on her death, and that he was entitled to retain them free from any trust. The plaintiffs contended, inter alia, that if Miss Jarman had intended the beneficial interest in the moneys on the joint accounts (but not the building society shares) to pass to the defendant on her death, it constituted a testamentary disposition, which was invalid for failure to comply with the requirements of the Wills Act, 1837. It is on this question that the case is reported.

Charles Russell K.C. and *H. A. Rose* for the plaintiffs. If the court relies on the defendant's recollection and accepts his evidence that Miss Jarman intended him to receive the beneficial interest, then the evidence shows that the disposition was intended to be testamentary. As a testamentary disposition it fails for non-compliance with the Wills Act, 1837. It is an attempt to make a nuncupative will of anything which might be left in the joint accounts at her death, and as such it is void. For the defendant to succeed he must show: (1.) either an intention at the time the accounts were opened to make an immediate effective gift, or (2.) a donatio mortis causa, or (3.) an inter vivos settlement in his favour subject to a power or revocation. The evidence shows that the gift was not intended to operate in any of these ways. Miss Jarman retained the control and beneficial interest in the property throughout her life, the disposition only took effect on her death : *Hughes* v. *Stubbs* (1). This point does not appear to have been raised in any English reported case, but it has been considered in certain Irish and Canadian cases. *Owens* v. *Greene* (2) is on all fours with this case. There it was held that an attempt to pass interests on death by putting money into joint accounts was an attempted testamentary disposition and as such it was invalid. This principle was applied in certain Canadian cases : *Hill* v. *Hill* (3), *Shortill* v. *Grannan* (4) and *McKnight* v. *Titus* (5). The point was not acceded to in *In re Reid* (6), but that case was really decided on the footing that the gift was an immediate effective gift, there was a dissenting judgment in which it was held that such an attempted testamentary disposition was invalid. It is submitted that the court should follow *Owens* v. *Greene* (2) and the cases in line with it, rather than *In re Reid* (6). A disposition such as this, which is intended to take effect on the donor's death, can only be effective (subject to certain exceptions) if properly executed in the form of a will. Here the donor retained all beneficial interest until her death, there was no trust for herself for life with remainder to the defendant. There cannot be a trust for A absolutely and on his death for B absolutely. The English cases are not really in point. [*Beecher* v. *Major* (7), *Tumbridge* v. *Carr* (8), *Deacon* v. *Colquhoun* (9) and *In re Harrison* (10) referred to.]

Sir Andrew Clark K.C. and *Sir N. Touche* for the defendant. This point may have been taken in some English case since 1837, although it does not appear in any reported case. It appears from *Marshal* v. *Crutwell* (11) that there were earlier cases of this type. It has been the practice of the English courts for the last 110 years to regard joint ownership in property in these circumstances as bestowing a valid gift on the survivor : *Marshal* v. *Crutwell* (11). The present case is on all fours with *In re Harrison* (1), although this point was not taken in that case. If the plaintiffs' argument were acceded to, it would upset the practice relating to joint accounts for the past 110 years. Doubtful cases from Eire and the Dominions are not sufficient to overthrow this position. It is submitted that *In re Reid* (2) was rightly decided, there it was held that a gift of the legal estate to take effect immediately coupled with the beneficial interest to take effect in futuro, subject to a power of revocation, was a valid gift. The other Canadian cases proceeded on the basis, that there was an incomplete gift. *Hill* v. *Hill* (3) must be taken to be overruled : *McKnight* v. *Titus* (4) was decided twelve years after *In re Reid* (2) which was not cited, and was decided on the same basis as *Hill* v. *Hill* (3) ; similarly *Shortill* v. *Grannan* (5) and *Owens* v. *Greene* (6) also turn on the finding that there was no complete gift. There is no objection to making a gift ambulatory, in that the subject matter may vary, and that the donor may take it all back.

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(1) (1842) 1 Hare 476.
(2) [1932] I. R. 225.
(3) (1904) 8 Ont. L. R. 710.
(4) (1920) 55 Dom. L. R. 416.
(5) (1933) 6 Mar. Prov. R. 282.
(6) (1921) 50 Ont. L. R. 595.
(7) (1865) 2 Dr. & Sm. 431.
(8) (1871) 25 L. T. 150.
(9) (1853) 2 Dr. 21.
(10) (1920) 90 L. J. (Ch.) 186.
(11) (1875) L. R. 20 Eq. 328.

Alternatively no equity can be established against the defendant. The donor intended to part with the beneficial interest at her death. The Wills Act does not come into question except where a claim is made by some-one in whom the legal estate is not already vested. Here the gift was clearly perfected, the defendant does not require the assistance of the court, and the Wills Act does not apply. The effect of the plaintiffs' contention would be that *In re Harrison* (1) was wrongly decided, and the statement of Jessel M.R. in *Marshall* v. *Crutwell* (7) regarding the previous law was wrong.

Cur. adv. vult.

Dec. 2. ROMER J. having stated the facts, proceeded : Regarding the matter as a whole it is in my opinion both intelligible and clear that Miss Jarman wished to save death duties and at the same time to benefit the members of the family. Her natural secrecy in financial matters deterred her from consulting her solicitors on the matter, so she evolved a plan for herself. Such a plan would have to conform, as it did conform, to her fondness for the possession of money, and the beneficial enjoyment by her relatives must accordingly be postponed until her death. With regard to the 3,000*l.* which she invested in Building Society shares she was content to take the income for her life and ensured that she should get it by causing her name to be entered as first of the joint investors in each case. The deposit accounts, however, stood on a different footing and she wanted to deal with them during her lifetime as she wished. Only what was left at her death was to go to the co-depositor, who was never expected to pay anything into the account and was not, so long as she was alive, to draw anything out for himself. When death should deprive her of any further use of her fortune then the benefits to her sister's issue would crystallize ; but they were to remain in suspense until then and, so far as the defendant's interest in the deposit accounts was concerned, it might result in nothing at all.

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(1) 90 L. J. (Ch.) 186.
(2) 50 Ont. L. R. 595.
(3) 8 Ont. L. R. 710.
(4) 6 Mar. Prov. R. 282.
(5) 55 Dom. L. R. 416.
(6) [1932] I. R. 225.
(7) L. R. 20 Eq. 328, 329.

Such being, as I believe, Miss Jarman's intentions, it would seem at first sight to follow that the defendant has not only a legal, but a beneficial title to the moneys and shares which are now in issue ; and none the less because Miss Jarman (as between herself and the defendant) retained control and dominion over the deposit accounts during her own lifetime.

In *Beecher* v. *Major* (1) a Mrs. Beecher transferred 1,000*l.* stock into the name of her niece Mary Major and wrote her a letter stating that she had done so, and that she intended it for the niece's benefit. In the letter Mrs. Beecher enclosed a bank power which she stated was to enable her to receive the dividends for her life and directing Mary Major to sign the power and get it witnessed. The niece accordingly did so and returned it to Mrs. Beecher. Mrs. Beecher had asked her niece to destroy the letter, which she did. Mrs. Beecher subsequently died, having received the dividends on the stock but not having otherwise acted under the bank power which, it turned out, instead of being merely a power to receive the dividends, was also a power enabling Mrs. Beecher to sell and transfer the stock. It appeared that Mrs. Beecher had always been very kind to Mary Major and by her will made before the transfer had given her an annuity of 30*l.* The question before the court was whether Mary Major was entitled to retain the stock for herself. Kindersley V.-C., after stating that the evidence proved satisfactorily that in her letter Mrs. Beecher had stated that she had transferred the stock into Mary

(1) 2 Dr. & Sm. 431, 436, 437.

Major's name and that she intended it for her benefit, proceeded : " But it is contended that the fact of Mrs. Beecher " having enclosed in her letter a power of attorney to be " executed (and which was accordingly executed) by Mary " Major, which power of attorney authorized Mrs. Beecher to " sell and transfer the stock itself as well as to receive the " dividends, is sufficient to prove that Mrs. Beecher intended " that Mary Major should be a trustee for her, because it " shows that she intended to keep the stock in her own power " and she might have sold it out at any time." The Vice-Chancellor then referred to and distinguished *Prankerd* v. *Prankerd* (1), and continued : " Here we have Mrs. Beecher's " express declaration of her intention that the transfer was " for the benefit of Mary Major. And in the next place, " Mrs. Beecher's procuring the power of attorney showed no " intention to retain the beneficial ownership ; it was only " reserving to herself a power to defeat Mary Major's interest " and it stands on the same footing as if Mrs. Beecher had " executed a formal declaration of trust in Mary Major's " favour, with a power of revocation. The reservation of the " power of revocation would not have destroyed the trust if " the power was not exercised. Under these circumstances " I can come to no other conclusion than that the letter clearly " proves it was Mrs. Beecher's intention to give a benefit to " Mary Major to the extent of the 1,000*l*. stock ; and that " Mrs. Beecher made the transfer into her name for the purpose " of carrying out that intention ; and that all she did by " requiring the power of attorney was to retain a right to " receive the dividends during her life, and also a right, if " she thought fit, to revoke the gift which, however, she " never did." The Vice-Chancellor made a declaration accordingly that Mary Major was entitled to the stock.

In *Marshall* v. *Crutwell* (2), the plaintiff's husband, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife and directed the bankers to honour cheques drawn either by himself or his wife, and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank

(1) (1820) 1 Sim. & St. 1.

(2) L. R. 20 Eq. 328, 330.

manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. The husband died a few months after the transfer and the plaintiff thereupon claimed to be entitled to the balance. Jessel M.R., held on the facts that no gift was intended by the husband to his wife, and that the transaction was not intended to be a provision for the wife but simply a mode of conveniently managing the husband's affairs. In the course of his judgment the Master of the Rolls said: "Now, in all the cases in which a gift to the wife has "been held to have been intended, the husband has retained "the dominion over the fund in this sense, that the wife "during the lifetime of the husband has had no power independently of him, and the husband has retained the power "of revoking the gift." He then proceeded to point out that in general a man would have no motive in transferring stock into the names of himself and his wife except the motive of benefiting her in case she survived; but that, as already indicated, he did find a contrary motive in the case before him. Two points seem to emerge from this, namely: (1.) That a number of cases had been previously decided in favour of surviving wives whose husbands had put a fund into their joint names but had reserved dominion and control over the fund during their (the husbands') lifetime, and (2.) that Sir George Jessel would have decided in favour of the plaintiff if the evidence had shown an intention on the part of the husband that she should take the fund, whatever it might be at his death, beneficially.

In *In re Harrison* (1) the headnote is as follows: "A husband, "in 1908, transferred the money standing to a current account "at his bank in his own name into the joint names of himself "and his wife. He did not inform his wife of the joint "account, and always drew cheques on the account himself. "He died in November, 1919. The wife never drew any "cheque on the account until shortly before his death, when "he was in failing health and unable to attend to business. "The bank manager then informed her of the joint account, "and advised her to draw a cheque, which she did. The "husband had also from time to time made deposits in the "joint names of himself and his wife, and in August, 1919, "consolidated them into one deposit in the joint names. The "wife never knew of this deposit until after her husband's

(1) 90 L. J. (Ch.) 186.

" death. There was then found among his papers an envelope " endorsed with the wife's initials and containing the deposit " receipt and a document in which he said : ' I would like " ' this paying away at once if possible as under,' with a list " of names with amounts against them." In addition to the facts stated in the headnote it appears from the body of the report that the bank manager stated that the ledgers there contained entries for many years past of deposit receipts in the names of the husband and wife, and that in such entries there was written : " Repayable to either or survivor." The manager said that such words would be written on the verbal instructions of the husband. Russell J. said that counsel for the parties who were resisting the widow's claim did not dispute that prima facie she, as survivor, would be entitled to the credit balances on the current and deposit accounts but contended that, at all events as regards the deposit account, he could rebut the presumption in her favour by the document which is referred to in the headnote. The learned judge did not, however, accept that view, and remarked that the document did not read so much as a trust of the husband's own property as a request relating to some one else's property. He then observed that the principles applicable to the case were dealt with by Sir George Jessel in *Marshall* v. *Crutwell* (1). He distinguished the facts in that case from those in the case before him and said (2) : . . . . it " is difficult here to find any motive for transferring the " account from the husband's name into the joint names, " except that the wife should take the money if she survived " her husband." He concluded his judgment by saying : " If " I am to infer from the surrounding circumstances what the " motive of the transaction was I hold that it was intended by " the husband that the moneys standing on current account " in the joint names were intended to belong to the survivor. " The case for the defendants as regards the deposit account " is much more difficult than that as regards the current " account, and I can see nothing to displace the wife's claim. " I hold, therefore, that the moneys standing to the credit " of both accounts belong to the wife."

Having regard to the conclusions at which I have arrived on the facts, I should, in view of the above authorities, have found little difficulty in holding that the defendant is entitled to the funds and shares in question but for a point that was taken by Mr. Russell for the plaintiffs and which is founded upon the requirements of the Wills Act, 1837. The argument (which is confined to the credit balances on the Lloyds account and the Savings accounts) is that by retaining as against the defendant dominion and control over these accounts during her lifetime, and limiting her benefaction to such credit balances only as might be in existence at her death, she was attempting to do that which can only validly be done by a will executed in conformity with the Wills Act. Mr. Russell says that in order for the defendant to succeed he must establish either an immediately effective gift by Miss Jarman during her lifetime, or an inter vivos settlement in his favour subject to a power of revocation by Miss Jarman, or a donatio mortis causa; that the evidence shows that Miss Jarman's bounty was not intended to operate in any of these ways; and that the medium through which it was intended to operate is invalid. The point does not appear to have been taken in any of the reported cases in this country which the industry of counsel brought to light, but it has been discussed in some Irish and Canadian cases. Before referring to them I should say that it is not in dispute that the relevant deposit books and pass books were, at all material times during Miss Jarman's lifetime, in her custody under her control.

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(1) L. R. 20 Eq. 328.

(2) 90 L. J. (Ch.) 186, 191, 192.

Owens v. *Greene* (1) is a decision of the Supreme Court of the Irish Free State. The headnote is as follows: "A.F., an "old man, kept large sums of money on deposit account in "a bank in his own name for several years. In March, 1927, "he called at the bank and asked the manager of the bank "for his deposit receipts. He told the manager that he "wished to settle his money, and that he was not able to do "until he saw Father O., but that he would like to do something for P.F. He then gave the manager a number of "deposit receipts, which he asked the manager to put in the "names of P.F. and himself, requesting the manager to put "the money in such a way that he could draw the interest "without going to P.F. The manager said that the only "way that he could do that was 'by putting it payable to "'them or either of them.' A sum of 16,917*l*., represented "by ten deposit receipts, was then placed on deposit in the "joint names of A.F. and P.F., the deposit receipts being "left by A.F. with the bank manager. A couple of days later "A.F. called at the bank and stated that he wished to take

(1) [1932] I. R. 225.

" 700*l*. out of the joint account and put it in his own name, " which accordingly he did, leaving 16,217*l*. standing in the " joint names on nine receipts, the receipts stating that the " bank acknowledged the receipt of the amount deposited by " A.F. and P.F., and continuing: 'For which we (the bank) " 'promise to be accountable to them or either of them.' " A week later A.F. cashed all the deposit receipts with interest, " and, having taken the interest, re-deposited the principal " sum to the same account, where it remained until May, 1929, " when he again cashed the receipts, took the interest and " re-deposited the principal. He subsequently withdrew the " principal several times, sometimes re-depositing only a portion " of the principal in both names, as before and depositing " the remainder in his own name. On September 8, 1930, he " called at the bank and asked for his receipts, and stated " that he was going to settle the money finally. He deposited " 5,000*l*. in the names of himself and P.F., receiving one " deposit receipt, 3,506*l*. in his own name alone, receiving one " deposit receipt, and 10,826*l*. 6*s*. 3*d*. in a new deposit account, " in his own name and that of Father O, receiving four " deposit receipts. He told the bank manager that he wished " no one to know anything of the moneys deposited except the " parties named with him on the receipts, and that the " manager could tell them that the moneys were to be their " property if anything happened to him, and that the receipts " were to be handed to the survivors. On December 15, 1930, " A.F. withdrew the sums deposited on September 8, retained " the interest, and re-deposited the amounts as before. All " these deposit receipts were in the form already stated. " A.F. died on December 29, 1930. On September 8, 1930, " A.F. had made another deposit, namely one for 200*l*. in the " joint names of Father O and his brother R.O., the deposit " receipt in this case being in favour of them 'or the survivor " 'of them.' R.O. had worked for A.F., and when making " this deposit A.F. asked the bank manager to get from R.O. " a receipt acknowledging payment of all his claims up to " date, and on getting such a release to deliver the deposit " receipt to R.O. This the manager did on the same day. " In October, 1930, P.F. was in the bank on business, and " told the manager that A.F. had told him (P.F.) that A.F. " had left him 'well off in the bank' and asked what the " amount was, and the manager told him of the 5,000*l*. " deposited in the joint names. Some days later Father O

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"asked the manager the same question, and the manager "told Father O of the four deposits in his and A.F.'s names. "On the day of A.F.'s death P.F. sent for and obtained from "the manager of the bank the deposit receipt in which he "was named with A.F., and on the same day Father O also "called at the bank and obtained the deposit receipts in "which he was named with A.F. P.F. and Father O each "instituted an action against the executor of the will of A.F. "claiming a declaration that the money on deposit in the "joint names of each plaintiff and A.F. did not form portion "of A.F.'s estate, but belonged to each plaintiff beneficially "by right of survivorship." The court held that the actions must be dismissed.

In the course of his judgment Kennedy C.J. said (1): "The "onus of rebutting the implication of a resulting trust by "evidence rests upon the plaintiffs, Patrick Freeley and the "Rev. M. J. Owens, who instituted these actions claiming to "be beneficially entitled by survivorship to the moneys "standing to the accounts in which they were respectively "named as joint creditors with Austin Freeley. They may "discharge the onus which they have undertaken and rebut "the presumption of a resulting trust by proving that it was "the intention of Austin Freeley, when putting the moneys "to the deposit accounts in the bank, to give to the plaintiffs "respectively, then and there and by that act, a right, that "is to say an immediate present right to take the moneys "with which he associated their respective names by survivor-"ship (should they survive him), for their own respective use "and benefit as surviving joint beneficial owners with him. "It will not suffice to prove a merely testamentary intention "on his part, for a testamentary disposition can be made "only by will. It will not suffice to show an incomplete, or "a conditional, or a postponed gift, nor can such an attempted "gift be made good by means of a fictitious trust. But "a gift completed by immediate transfer or legal ownership "or by declaration of trust taking immediate effect will, if "proved, support an intention to give a voluntary benefit "and rebut the presumption of resulting trust. These "principles . . . . are well established, and we have only to "consider their application to the facts before us . . . . It "is an attempt to make an ambulatory and postponed gift "of such (if any) moneys as shall remain undrawn from the

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(1) [1932] I. R. 225, 237, 238.

" account at the depositor's death, which, in my opinion, is " contrary to the established principles inasmuch as it is " really testamentary in character and intention, and for " that reason I am unable to accept the decision in *Diver* v. " *M'Crea* (1) which is, I think, erroneous." FitzGibbon J. delivered a judgment to the like effect (2). " With the exception of *Diver* v. *M'Crea* (1) . . . . I am not aware of any " case in which the alleged donor retained throughout his " life the complete power of disposition over the property in " dispute, and it was held that there had been a complete " gift by him in his lifetime" ; and, later he said : " In my " opinion the plaintiffs have failed to establish any present " intention on the part of Austin Freeley to part with his " property in, and absolute dominion over, the deposited " money during his lifetime, and a disposition, to take effect " only upon his death, if he should not have previously " disposed of the money cannot be effected except by a declaration of trust, which is admitted not to have been made by " him." And Murnaghan J. delivered judgment to the same effect.

Having regard to this decision, which has not, so far as I am aware, been adversely criticized, and which in fact adopted and applied earlier Irish decisions, it seems clear that if the case before me were to be decided in the Courts of Eire it would be decided against the defendant. Similar principles were recognized and applied in the following Canadian cases, namely, *Hill* v. *Hill* (3) ; *Shortill* v. *Grannan* (4) and *McKnight* v. *Titus* (5), the last two being decisions of Sir Douglas Hagen C.J., of the Supreme Court of New Brunswick. In *In re Reid* (6), however, the Appellate Division of the Supreme Court of Ontario took a different view. The facts of that case are sufficiently set out in the headnote, as follows : " R. " having made up his mind to give his father a sum of money, " to come into his possession after R.'s death, placed the " amount on deposit in a bank to the credit of a joint account " in his own name and that of his father. The terms on " which the joint account was opened were evidence by a " document addressed to the bank and signed by R. and " his father, reading : ' All moneys deposited or that may be

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(1) (1908) 42 Ir. L. T. 249.

(2) [1932] I. R. 225, 241, 251, 252.

(3) 8 Ont. L. R. 710.

(4) 55 Dom. L. R. 416.

(5) 6 Mar. Prov. R. 282.

(6) 50 Ont. L. R. 595, 599.

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"'deposited by us and each of us to the credit of this account "'are our joint property, but they may be withdrawn by "'cheques made by either of us or the survivor of us.' It "was understood between them that the father was not to "draw the money during R.'s lifetime and that R., if he "needed the money for himself, should be at liberty to "draw what he required. R. was then ill of the disease of "which he died about three weeks later." The court held, with one dissentient, "that there was a complete gift of the "fund to the father." Meredith C.J. of Ontario in the course of his judgment referred to *Standing* v. *Bowring* (1), in which case the plaintiff, a widow, transferred a fund into the joint names of herself and her godson, with the express intention that the godson, in the event of his surviving the plaintiff, should have the fund for his own benefit but that she should have the dividends during her life. The Court of Appeal held that there was no resulting trust in favour of the plaintiff because she intended to confer a benefit on the godson, the intention being (in the words of Cotton L.J.) "to give him "a beneficial interest in the stock and that, on her death, "as he survived her, the legal right must prevail, and he must "take the property for his own benefit." In applying that decision to the case before him the Chief Justice said that he saw no difference in principle between the retention by the owner of the dividends on the Consols and the retention by the son of the right to draw from the fund what, if anything, he might require to use. The Chief Justice rested his judgment in favour of an effective gift by R. to his father on the ground that upon the death of the son the legal right to the fund became vested in the father and that there was no ground for enforcing the equitable right which the son's executors set up, it being clear that the son's intention was that at his death the fund, or what remained of it, should belong to his father. Maclaren J. and Magee J., Justices of Appeal, agreed with the judgment of the Chief Justice (2). Ferguson J., Justice of Appeal, said in his judgment that it was clear that R. intended that on his death the father should be the absolute owner of the fund. He said ". . . . it seems to me "that there was, at the time of and by virtue of the deposit, "a complete and perfect gift of a joint title or interest in "the money which, by operation of law as well as by expressed "intention and agreement, carried with it a right to title

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(1) (1885) 31 Ch. D. 282. (2) 50 Ont. L. R. 595, 600, 606, 607, 608.

"by survivorship—to my way of thinking, the title of the "defendant and the gift as a gift were complete when and as "soon as the deposit was made; from that time on the donee's "title was complete and perfect." The learned judge rejected the argument that the effect of the arrangement between R. and his father was to leave the dominion and control of the fund in the donor, so that he had power to and might revoke the gift and that therefore the gift was not in any sense a complete and perfect one; and said "To my mind, the gift "was complete and perfect, and the promise and agreement "deposed to should, according to the true intent and meaning "of the parties, be viewed as a collateral agreement whereby "the donor was not given a right of revocation, but a right "and power to defeat in whole or in part the purpose of the "gift. The gift of the joint interest was, I think, intended "to be effective from the moment of the deposit, so as to "carry with it the legal right to title by survivorship; the "promise and agreement in reference to drawing were not "intended to, and did not, prevent the vesting of a title to the "joint interest, as to which there was, I think, a complete "and perfect gift inter vivos." Hodgins J., Justice of Appeal, dissented. In his view the decision in *Standing* v. *Bowring* (1) was inapplicable. "With great respect" he said "I think "the cases differ radically in this respect, that in *Standing* v. "*Bowring* (1) there was on the evidence a complete gift with "the express intention that on the donor's death the donee "should have all the principal, the donor having only the "dividends for life—while here there is a retention, not of "income, but of the right to use during the lifetime the "substance of the gift itself. This dominion over the subject, "said to be 'given' with the intention that on the death all "or what is left shall go to the donee, seems indistinguishable "from that incident to a testamentary gift, which does not "change the ownership but takes effect only on death." Hodgins J. founded his dissenting view on the principle on which the earlier Ontario case of *Hill* v. *Hill* (2) had been decided and which was, he thought, applicable to the case which was before him. In *Hill* v. *Hill* (2) the plaintiff's father owned 400 dollars on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to himself and the plaintiff, or either, or the survivor. The understanding between the father and son was that the

(1) 31 Ch. D. 282. (2) 8 Ont. L. R. 710.

money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should belong to his son. He retained the receipt intact in his own possession, and it was found amongst his papers at his death. The above facts were deposed to by the plaintiff. Anglin J., in the course of his judgment, said: "Upon the plaintiff's own evidence I find msyelf driven to "the conclusion that the purpose of William Hill deceased "was by this means to make a gift to his son, the plaintiff, in "its nature testamentary. As such it could only be made "effectually by an instrument duly executed as a will. The "father retaining exclusive control and disposing power over "the 400 dollars during his lifetime, the rights of the son "were intended to arise only upon, and after, his father's "death. This is, in substance and in fact a testamentary "disposition of the money and, as such, ineffectual." He added that he was unable to regard the receipt as equivalent to a voluntary settlement, reserving to the settlor a life interest with a power of revocation.

It appears to me accordingly that if the Irish case of *Owens* v. *Greene* (1) had come before the Courts of Ontario it would have been decided the other way. The plaintiffs invite me to follow *Owens* v. *Greene* (1) and the Canadian cases which are in line with it. I confess that the reasoning of those cases appeals to me and if there had been no English authority relevant to the question I should have felt inclined to apply that reasoning notwithstanding that, by so doing, I should have defeated Miss Jarman's expressed intentions. I find it difficult to regard Miss Jarman's deposit account transactions as voluntary settlements by her in the defendant's favour coupled with a power of revocation. I find it equally difficult to regard them as operating as immediately effective gifts of anything, seeing that, as between Miss Jarman and the defendant, the defendant was to have no power of withdrawal so long as Miss Jarman was living, whilst she retained the entire beneficial title to the funds. Further, it is impossible to regard the transactions as donationes mortis causa. There only remains the view, accordingly, that the gifts were intended to be postponed until Miss Jarman's death and to operate then so as to pass for the first time to the defendant a beneficial right to assets of Miss Jarman as then ascertained. In my judgment, however, it would not be right for me to defeat

(1) [1932] I. R. 225.

the defendant by applying this course of reasoning. In the first place the cases which have come before the courts of this country in which a depositor has put funds in the joint names of himself and another, intending to retain control over the funds and to withdraw from them if he thought proper, but with the further intention that the other party (if surviving) should take beneficially whatever might be left of the funds at the death of the depositor, have all, so far as I am aware, resulted in the surviving beneficiary taking free from any trust. It is true that there is no reported case, so far as I know, in which the point now raised was presented to the court. That there were cases of this type prior to *Marshall* v. *Crutwell* (1), however, appears from the observations of Sir George Jessel which he made in that case; and it is impossible to say that the point was not taken in any of them or in any subsequent cases. Secondly, there is the fact that a court whose decisions are entitled to very great respect, namely, the Appellate Division of the Supreme Court of Ontario, had the very point before them but did not accept it. In these circumstances, and having regard to the disturbing effect which an acceptance of the argument might well have on titles already acquired, I think it is better that the change in the current of authority which I am invited to make should be made rather by the appellate court than by a court of first instance, assuming that it is to be made at all.

I hold accordingly, that the defendant is beneficially entitled to the credit balances on the deposit accounts as well as to the shares which are in issue in this action. The action, in my judgment, fails and must be dismissed with costs.

Action dismissed.

Solicitors: *Sharpe Pritchard & Co., Agents for Alms & Young, Taunton; G. Houghton & Son.*

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(1) L. R. 20 Eq. 328, 329.

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Feb. 15, 16, 17.

Lord Greene M.R. Somervell and Cohen L.JJ.

In re WELLSTED'S WILL TRUSTS
WELLSTED *v.* HANSON

Will—Trust for sale and conversion—Investment of proceeds of sale in the purchase of land—Investment of proceeds of sale in securities—Investment in purchase of land when proceeds of sale already invested in securities can be traced—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 1.

The Law of Property Act, 1925, s. 28, sub-s. 1, has, by providing that "trustees for sale shall in relation to land . . . . have all "the powers of a tenant for life and the trustees of a settlement "under the Settled Land Act, 1925," conferred on trustees for sale of land the power to apply the proceeds of sale of land in the purchase of other land; for the sub-section gives the trustees for sale in respect of the proceeds of sale of land the same power to acquire land as is conferred by the Settled Land Act, 1925, s. 73, sub-s. 1 (xi.) in respect of capital moneys arising under the latter Act.

When trustees for sale have made investments of the proceeds of sale of land, they can, so long as the proceeds of sale can be traced, apply the realized amount of the investments in the purchase of land.

Decision of Vaisey J. [1948] Ch. 610 reversed.

APPEAL from Vaisey J. (1).

William Henry Wellsted by his will dated August 18, 1915, after appointing executors and trustees, gave the whole of his real and personal estate not thereby otherwise disposed of to his trustees upon trust for sale and conversion. He directed that out of such proceeds and his ready money his funeral and testamentary expenses, debts and legacies should be paid and that the net proceeds of such sale and conversion should be invested and that his trustees should hold the residuary trust fund so constituted upon trust to pay the income to his wife during her widowhood. Subject thereto he directed that his residuary trust fund should be divided between his children, the shares of his daughters to be settled on them for their respective lives and afterwards for the benefit of their issue. The will contained provisions empowering the trustees to postpone the sale and conversion of the testator's real and personal estate or any part thereof for so long as they should think fit, the profits and income of such part of his estate as should for the time being remain unsold to be applied as income of his residuary trust fund; and he authorized the trustees to allow the whole or any part of the estate to remain in the same state or condition of investment as at the time of his death. The will contained no express power of investment so that the estate when realized had to be invested in trustee investments unless it could be applied in the purchase of land. The testator died on December 9, 1920. He was survived by his widow who had subsequently died and four children, one son and three daughters, and the three daughters all had issue living.

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(1) [1948] Ch. 610.

The testator's residuary estate comprised at his death (in addition to personal property of considerable value) real estate of the value of 91,000*l.*, or thereabouts. Before January 1, 1926, when the Law of Property Act, 1925, came into operation, real estate of the testator of the value of 16,000*l.*, or thereabouts, had been sold, and after part of the proceeds had been applied in the payment of duties there remained a sum of about 8,800*l.* which was invested in trustee investments, and these were still held by the trustees and could presumably be identified. From time to time after January 1, 1926, further parts of the real estate had been sold and the proceeds placed in similar investments, realizing a total of 13,100*l.* or thereabouts, also still held by the trustees. A house forming part of the testator's estate had recently been sold and the plaintiffs as the present trustees had in hand a sum of 574*l.* 7*s.* 0*d.*, being the proceeds of sale, still awaiting investment. Besides the investments and sums of money already mentioned (and other investments) the trustees still held a considerable amount of real estate which belonged to the testator at his death and still remained unsold. Its value was estimated at upwards of 40,000*l.* The plaintiffs considered it advisable that some part of it should be sold and the proceeds reinvested in the purchase of other real estate. Some, possibly all of the adult beneficiaries, including the first and second defendants, concurred in that opinion and they had further suggested that the sum of 574*l.* 7*s.* 0*d.*, and some of the investments representing the said sum of 8,800*l.* and 13,100*l.*, might advantageously be invested or reinvested in the purchase of real estate.

A summons was taken out by the trustees of the will asking whether on the true construction of s. 28 of the Law of Property Act, 1925, they had power to invest and reinvest in the purchase of real estate: (a.) the sum of 574*l.* 7*s.* 0*d.*

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in hand awaiting investment, being the proceeds of sale of a house; (b.) investments representing the sum of 13,100*l.* being the proceeds of sale of real estate sold since January 1, 1926; (c.) investments representing the sum of 8,800*l.* being the balance of the proceeds of sale of real estate sold before January 1, 1926; (d.) the proceeds of sale of real estate thereafter to be sold. The first defendant to the summons was a daughter of the testator; the second and third defendants were grandsons of the testator, the first being an adult and the second an infant joined for the purpose of contesting the application.

Vaisey J. (1) held that s. 28, sub-s. 1, of the Law of Property Act, 1925 (2), did not authorize trustees holding land on trust for sale to apply the proceeds of such land in the purchase of other land as an investment. Section 28 merely authorized the use of such proceeds of sale in the acquisition of other land by exchange or purchase when such exchange or purchase is for a Settled Land Act purpose ancillary to unsold land held by the trustees for sale. The first and second defendants appealed.

Pascoe Hayward K.C. and *Hesketh* for the first and second defendants.

The testator's will contained no investment clause so that the only investments available for the proceeds of sale of any land would be trustee investments unless the Law of Property Act, 1925, s. 28, sub-s. 1, confers on trustees for sale the power to acquire land. That section was amended by the Law of Property (Amendment) Act, 1926, but not so as to effect the matter in question here which depends on the early words of the subsection conferring on trustees for sale in relation to the proceeds of sale all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925. Part II of that Act is headed "Powers of a "tenant for life" and Part III is headed "Investment or "other application of capital money." It is to these that s. 28 refers including s. 73 which provides by sub-s. 1 the modes in which capital money should, when received, be invested or otherwise applied and para. xi of the sub-section reads, "in purchase of land in fee simple, or of leasehold "land held for sixty years or more unexpired at the time "of purchase." That power is conferred on trustees for sale of land by s. 28, sub-s. 1 of the Law of Property Act, 1925, and s. 75, sub-s. 2 of the Settled Land Act provides that the investment or other application by the trustees shall "be "made according to the direction of the tenant for life, and "in default thereof according to the discretion of the trustees "but in the last mentioned case subject to any consent "required or directions given by the settlement." That shows the position of trustees for sale in regards to proceeds of sale on the true construction of s. 28. Cases referred to and relied on by Vaisey J., are *In re Kempthorne* (1) and *In re Stimpson* (2) in both of which the effect of s. 28 was considered.

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(1) [1948] Ch. 610.

(2) The Law of Property Act, 1925, s. 28, sub-s. 1: "Trustees for sale shall, in relation to land or to manorial "incidents and to the proceeds "of sale, have all the powers of a "tenant for life and the trustees "of a settlement under the "Settled Land Act, 1925, including in relation to the land the "powers of management conferred by that Act during a "minority . . . . and (subject to "any express trust to the contrary) all capital money arising "under the said powers shall, "unless paid or applied for any "purpose authorized by the "Settled Land Act, 1925, be "applicable in the same manner "as if the money represented proceeds of sale arising under the "trust for sale.

"All land acquired under this "sub-section shall be conveyed "to the trustees on trust for sale.

"The powers conferred by this "sub-section shall be exercised "with such consents (if any) as "would have been required on "a sale under the trust for sale, "and when exercised shall operate "to overreach any equitable "interests or powers which are "by virtue of this Act or otherwise made to attach to the net "proceeds of sale as if created by "a trust affecting those proceeds."

The learned judge did not hold that the powers conferred by s. 73 of the Settled Land Act, 1925, were not incorporated in s. 28, sub-s. 1 of the Law of Property Act, 1925, at all. He held that such powers were incorporated but he then fettered them by holding that the powers of investment conferred by s. 73, sub-s. 1 were not exercisable by trustees for sale under s. 28, sub-s. 1, but only the administrative powers conferred by that section, as for example those conferred by paras. (iii) to (x) of sub-s. 1 of s. 73. It is submitted that the word "powers" in s. 28 is wide enough to include all the methods of application of capital money provided for by s. 73.

The question turns wholly on the true construction of

(1) [1930] 1 Ch. 268.

(2) [1931] 2 Ch. 77.

s. 28, sub-s. 1. There appear to be three main arguments which support the appellants' construction of the section.

First, it may be said (in answer to the contention of the respondent that s. 73 is not incorporated in s. 28 at all) that Parliament has itself shown by provisions in later Acts that it considers s. 73 to be so incorporated. The provisions in question are s. 66, sub-s. 2 of the War Damage Act, 1943, and s. 71, sub-s. 4 of the Town and Country Planning Act, 1947.

[LORD GREENE M.R. How far are we bound by a view which Parliament subsequently took of the effect of a prior Act ?]

It is submitted that in the case of an ambiguity in the construction of an Act the subsequent views of Parliament as to its meaning can be relied on. The sections referred to do assist the view that s. 73 is incorporated in s. 28, sub-s. 1.

Secondly it is contended that as in s. 63 of the Settled Land Act, 1882, there was an express provision that the proceeds of sale of land held on trust for sale should not be invested in the purchase of land and Parliament did not see fit to re-enact those provisions in the 1925 legislation, it cannot be assumed that s. 28 was not intended to authorize investment of the proceeds of sale of land in the purchase of land. If the intention had been to perpetuate this restriction, an express provision would have been inserted to that effect.

Thirdly, the text-book writers have all expressed the view that s. 28 authorizes investment of proceeds of sale in the purchase of land. Their views must have some persuasive authority. Solicitors in reliance on those views must have many times advised trustees for sale that they had power to invest in the purchase of land. If the text-book writers were wrong, those purchases are a breach of trust. In the case of ambiguity the court should take into account the view of text-book writers.

In construing s. 28, sub-s. 1, the following points show that the appellants construction is the correct one. First, trustees for sale are given in unqualified language "all" the powers of a tenant for life; secondly, land and the proceeds of sale of land are dealt with on the same footing; thirdly, the sub-section envisages that land will be purchased as there is an express provision that land acquired under the sub-section shall be conveyed on trust for sale; fourthly, if Parliament had intended that s. 73 should only be incorporated to a limited extent it would have said so. There is no justification for the view of the learned judge that s. 73 can be incorporated to a limited extent. The words "paid or "applied" at the end of the sub-section may refer to the opening words of s. 73.

It is not necessary for the appellant to say that *In re Wakeman* (1) was wrongly decided but he would say so if it were necessary. A trustee for sale who had sold all the land vested in him is still a "trustee for sale" within the definition in s. 205, sub-s. 1 (xxix) of the Law of Property Act, 1925. Where the proceeds of sale of land have been invested they retain their original quality of proceeds of sale of land so long as they can be identified and they can, notwithstanding such investment, be applied in the purchase of land: see s. 75, sub-s. 7 of the Settled Land Act, 1925.

Jennings K.C. and *Geoffrey Cross* for the infant defendant. It is submitted that there are two possible constructions of this section which support the defendant's contention. First, the powers which are imported into s. 28 do not include the powers conferred by s. 73 of the Settled Land Act, 1925. That is the narrow construction.

Secondly, if the provisions of s. 73 are imported into s. 28 only the management and administration provisions of that section are so imported. The learned judge took this latter view which it is submitted is that of conveyancers generally. The learned judge was right in the distinction he drew. Section 28, sub-s. 1, gives certain powers over proceeds of sale but it does not say that such proceeds shall be deemed to be capital moneys. The section does not refer to investment but only to moneys "paid or applied for any purpose." These words are not fit to cover ordinary investment. These words limit the application of capital moneys to management purposes. Section 28 authorizes the application of proceeds of sale for equality in an exchange.

Returning to the first point it is contended that s. 73 is not incorporated in s. 28 at all. The powers referred to are the powers of a tenant for life conferred by Part II of the Settled Land Act, 1925, ss. 38—72, and the powers conferred by s. 90. Section 73 is not in Part II and is not an empowering section at all. Trustees for sale may acquire land without importing s. 73 into s. 28 either by exchange under s. 38 of the Settled Land Act, 1925, or by the acceptance of a lease under the power conferred by s. 53 of that Act or as the result of a compromise under s. 58. The intention of s. 28, sub-s. 1, is not to allow investment in land but realization of land. It is so stated as the purpose of the section when first passed in the Law of Property Act, 1922, sch. IV, para. 4. Before the Settled Land Act, 1925, trusts for sale were dealt with in the Settled Land Act, 1882, but then the power to purchase land was expressly excluded by s. 63. That express exclusion ceased to be necessary when trustees for sale were dealt with in the Law of Property Act: see *In re Kempthorne* (1). It might be that under s. 73, sub-s. 1 (xi), land might be bought to improve a holding of existing land by way of administration. If s. 73 applies at all it is to enable the trustees to do what is necessary or perhaps desirable for purposes of administration but not for purposes of investment. In so far as s. 28 is ambiguous regard should be had to the introductory words of the schedule of the 1922 Act.

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(1) [1945] Ch. 177.

Further the courts lean against holding that a Consolidating Act, such as the Law of Property Act, 1925, has altered the law. [He referred also to sch. IV, para. 11 of the Act of 1922.] In *In re Wakeman* (2) the present question did not arise, as the view taken by Uthwatt J. was that trustees for sale who had disposed of all the land they had held could no longer be called persons holding land upon trust for sale. The practical question remains whether, where land has been sold and the proceeds invested in, for example, some Government loan, it could still be treated as " proceeds of sale " does not arise, if the previous argument is correct; but if not, it is suggested that the proceeds of sale when invested otherwise than in land would have ceased to be proceeds of sale. It is impossible to trace proceeds of sale into investments.

W. M. Hunt for the trustees.

Pascoe Hayward K.C. in reply.

LORD GREENE M.R. This appeal raises some interesting questions as to the powers of trustees under trusts of land settled by way of trust for sale. Those questions depend for their solution upon the true construction and effect of s. 28 of the Law of Property Act, 1925. That section notoriously has given rise to considerable doubts and difficulties—a fact which, having had the advantage of having it discussed

(1) [1930] 1 Ch. 268.

(2) [1945] Ch. 177.

for the best part of two days, does not surprise me. The plaintiffs are the trustees of the will of the testator, William Henry Wellsted, under which certain land was settled in trust for sale. The will contained no investment clause. The trustees have in their hands certain moneys, and they expect to have certain other moneys in the future. These moneys were in part derived from sales of parts of the land, and with regard to one sum it was derived from a receipt under the War Damage Act. The trustees also have certain investments representing the earlier proceeds of sale of other parts of the land. The questions for our decision fall under two heads. The question of the war damage receipt is not raised in this court, because it is conceded that the language of the section with which we have to deal is not wide enough to cover that receipt; but we have to deal with the actual moneys which the trustees have in hand, and that of course would cover any other sums of money which they might receive on some future sale of other parts of the land; the other head relates to the investments which they hold. The trustees are anxious to invest money in the purchase of land, and the question is, can they do it, either as regards the actual cash that they hold or as regards the proceeds of the investments which they might sell for the purpose? As the question of this power of investment in land concerned those interested in capital, Vaisey J., quite properly, required the addition as a defendant of the infant defendant, to represent capital and in order that the argument against conceding these powers to the trustees might be presented to the court. Vaisey J., held that neither of those two classes of property, the cash or the investments, were applicable in the purchase of land by way of investment.

Section 28 of the Law of Property Act, 1925, comes from sch. IV. to the Law of Property Act, 1922. Under the previous legislation, land held on trust for sale was dealt with in the Settled Land Acts, and, to a certain extent and for certain purposes the statutory provisions relating to settled land held otherwise than on trust for sale were made applicable to land held on trust for sale. Broadly speaking, the way in which that was done was that land held on trust for sale was deemed to be settled land, but the powers in relation to it on that basis were subject to special provisions. In the Law of Property Act, 1922, which of course dealt with many matters relating to land, not merely conveyancing matters but also matters which were what might be called settled land matters, a new departure was made in relation to land held on trust for sale: it was no longer made by definition settled land for the purpose of the Settled Land Act, but the method of making the beneficial provisions of the Settled Lands Acts apply to land held on trust for sale was, without making the land settled land, to confer on the trustees for sale certain Settled Land Act powers. The Law of Property Act, 1925, was a consolidating Act, and it dealt with those provisions of the Act of 1922 which were conceived of as ordinary property or conveyancing matters. The matters in the Act of 1922 which were properly thought of as settled land matters were embodied in the consolidating Settled Land Act, 1925, but the provision in sch. IV. to which I have referred was brought into s. 28 of the Law of Property Act, 1925, with an addition which was introduced by the Law of Property Act, 1924. One subsequent addition was made, to which again I will refer in a moment.

There are two observations to make which appear to me to have some relevance to the question which we have to decide. First, the matter of land held on trust for sale is, so to speak, lifted out altogether from the Settled Land Act legislation, and inserted in the property legislation, where it is dealt with in s. 28, and, by reference, certain Settled Land Act powers and provisions are imported into the section. The other observation which I wish to make is, that under the old scheme, while land held on trust for sale was treated as an integral part of the Settled Land Act legislation, there was an express provision in s. 63 of the Settled Land Act, 1882, forbidding the investment in land of money realized by an exercise of a trust for sale. Such investment was permissible in cases which fell strictly under the Settled Land Act when the statutory powers had been exercised and capital moneys had arisen; but where moneys arose under a trust for sale there was an express prohibition against any such investment. Under the new scheme no such express prohibition appears. It is said that that is to be explained by the fact that the whole scheme is now a different one from that under the Act of 1882. It is perfectly true, of course, that the scheme is different, but nevertheless I should have thought that in view of the language used in s. 28 of the Act of 1925 (language which is, to say the least of it, ambiguous as to whether or not the power to invest in land is imported), Parliament, having before it the old prohibition against investment in land contained in the scheme which it was replacing, would, if it had intended that prohibition to persist in the new scheme, have said so in terms. That is only, so to speak, a prima facie view, and could not in any way override the language of the Act if on its true construction such an investment is prohibited; but it is a circumstance, I think, which is not to be entirely disregarded, although the weight to be given to it is, of course, of a limited nature.

Section 28, sub-s. 1, of the Law of Property Act, 1925, is as follows: "Trustees for sale shall, in relation to land or to "manorial incidents and to the proceeds of sale, have all the "powers of a tenant for life and the trustees of a settlement "under the Settled Land Act, 1925"—I pause there for a moment. There are one or two things to notice about that. First of all, the trustees are to have powers in relation to three subject-matters. The first is land, the second, introduced by the alternative "or," is manorial incidents, and the third, introduced by the word "and," is proceeds of sale. It is clear, and I think it is common ground, that the phrase "the proceeds of sale" in that context means the proceeds of a sale by trustees for sale. If the trustees in the exercise of the trust for sale receive certain proceeds, those proceeds are to be the subject-matter of the powers in question. At this stage I must refer to an argument, which I do not accept. It is an argument as to the construction of the words "the proceeds of sale." It is said that those opening words which I have read must be construed as saying that trustees for sale are to have, in relation to land and also "in relation to land "with regard to the proceeds," the powers set out. That would limit the powers to powers in respect of what I may call, for want of a better phrase, the administration of land, and not extend them to the application of the proceeds at large. That is a construction which I do not find myself able to accept. It involves writing into the sub-section words which are not there. The words, so far as they affect the proceeds of sale, are as follows: "Trustees for sale shall, in "relation . . . . to the proceeds of sale, have all the powers "of a tenant for life," and I cannot paraphrase that by saying that when the section says "the proceeds of sale" it really means the proceeds of sale in some limited relationship or to some limited extent. It appears to me that the phrase is unqualified. One of the two last preliminary observations

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that I make about that is that the word used is the word "all"; the powers given are "*all* the powers of a tenant "for life". I do not think it is an exaggeration to say that the word "all," in construing a statute, is extremely recalcitrant, and if the word "all" is to be cut down so as to exclude certain things which might come under the description, that must be done in the clearest possible language. The proper way of construing a word like the word "all" in such a context as this is to say that "all" means "all," and it does not mean "some" unless you find a compelling context which forces you to place some limitation on the word. The last observation, and it is important that I should mention it at this stage, is that what the trustees are to have under the section is "all the powers of a tenant for life and the trustees of a "settlement." Emphasis in the argument is laid on the word "powers," and it is pointed out that there is a common and well-known distinction which every lawyer concerned with these things will recognize between a power and a trust.

Proceeding with the section, the next sentence runs as follows: "including in relation to the land the powers of "management conferred by that Act during a minority."—With regard to that it was suggested, but not with very much force, that the presence of an express reference to that threw some light on the intention of the earlier words, and indicated that the earlier words did not confer the power to invest in land. I myself do not find in those words any particular guidance which need delay me. Then there comes this passage, which was inserted as an amendment by the Law of Property (Amendment) Act, 1926: "and where by statute settled "land is or becomes vested in the trustees of the settle- "ment upon the statutory trusts, such trustees and their "successors in office shall also have all the additional "or larger powers (if any) conferred by the settlement "on the tenant for life, statutory owner, or trustees of "the settlement." It is right, I think, in construing the section, to remember that that was put in by amendment, and that in the section in its original form the words ran straight on into the following phrase: "and (subject to any express "trust to the contrary) all capital money arising under the said "powers shall, unless paid or applied for any purpose "authorized by the Settled Land Act, 1925, be applicable "in the same manner as if the money represented the proceeds "of sale arising under the trust for sale." I call attention to the insertion of that paragraph by way of amendment for the reason that, when the following words refer to " capital " money arising under the said powers," the phrase " the " said powers " must relate back to what I may call the Settled Land Act powers, which were conferred on the trustees by the opening words of the sub-section. That is not disputed. The reference, therefore, to " capital money," relates to capital money arising when the said powers are exercised, and a distinction is drawn, obviously to my mind, between the proceeds of sale which are mentioned at the beginning of the section, which quite clearly refer to proceeds of the trust for sale, on the one hand, and the capital moneys arising under the imported Settled Land Act powers on the other hand; and obviously Parliament, or the draftsman, realized that the trustees, having regard to the giving of those Settled Land Act powers, might have in their hands moneys of a capital nature which would not fall within the description of " proceeds of sale," because they would have arisen, not by an exercise of the trust for sale, but by an exercise of one of the Settled Land Act powers; and it seems to me that the object of those words was to enable such moneys to be dealt with. The next paragraph in the sub-section is as follows: " All land acquired under this sub-section shall be conveyed " to the trustees on trust for sale." That sentence in point of fact did not appear in sch. IV. to the Act of 1922, which to that extent, from the conveyancer's point of view, so to speak, was very defective, because it was essential, with a view to matters like conversion, to know what the status of any land acquired under the new powers was to be. Was it to be land, or was it to be personalty? The effect of the introduction of that sentence was to give it the status of personalty, just the same status as was originally possessed by the land originally settled on trust for sale. That is the form in which the relevant parts of the legislation stand. Vaisey J., had to consider two arguments intended to establish that the trustees, under these words, had no power to purchase land by way of investment. The Settled Land Act powers to purchase land are to be found in s. 73, sub-s. 1 (xi.) of the Settled Land Act, 1925. That sub-section sets out, under twenty-one heads, the manner in which capital moneys arising under the Settled Land Act are to be applied, and I think I had better read two of them. The first is a pure investment paragraph, referring to investment in government securities or other trust securities, and the other is a power to purchase land, which does not use the word "investment" at all. It runs in this way: "In purchase of land in fee simple, "or of leasehold land held for sixty years or more unexpired "at the time of purchase, subject or not to any exception "or reservation." There are numerous other provisions under which the capital moneys may be applied, and I think it is fair to say that if s. 73 were to be excluded from the matters imported by s. 28, the scope of the operation of s. 28 would be limited to a very absurd degree.

The first argument addressed to Vaisey J., and indeed the first argument addressed to us, was that s. 73 of the Settled Land Act is excluded in toto. That argument was not pressed with any enthusiasm, because it was realized that not only had Vaisey J. rejected it, but the acceptance of it would hamstring the beneficial object of s. 28. It was founded on the words of s. 28, sub-s. 1, which says that trustees for sale are to have "all the powers of a tenant for life and the trustees "of a settlement," and it was pointed out that s. 73 does not in terms confer powers, but imposes obligations. It says: "Capital money . . . . shall, when received, be invested or "otherwise applied wholly in one, or partly in one and partly "in another or others, of the following modes." That, it is said, is not properly described as a "power" but a statutory obligation, compelling the application of capital money in one or other of the manners indicated. In answer to this it may be observed that under the Settled Land Act the choice of the object to which among those particular objects the money is to be applied lies with the tenant for life; it is the tenant for life who has the power to direct the application by the trustees of the capital moneys in one or other of these authorized manners, and if the tenant for life gives no such direction it is the trustees themselves who have a discretion as to which of those objects shall be the one to which the money is to be applied. It seems to me that, quite apart from the overriding argument that the exclusion of s. 73 would operate in a ridiculous manner, the discretionary power of the trustees, or of the tenant for life—under s. 28 it would be the trustees—to choose among a number of statutory objects, may properly be described as a "power." If the draftsman of s. 28 had wished to draw a distinction between the sort of power which the trustees have under s. 73 and "powers" in the strict sense, then I can only wonder why he did not do so. He has used language that appears to me, on a fair construction, having regard to the subject-matter, to cover s. 73. That, as I say, was the view taken by Vaisey J., and I respectfully agree with it.

The second argument presented to Vaisey J., and the main argument presented to us, is that s. 28 on its true construction is selective, so that only some of the powers mentioned in s. 73 are imported by the words of reference in s. 28. But when once it has been decided that the matters mentioned in s. 73 of the Settled Land Act can properly be described as "powers," you are met by the recalcitrant word "all," as showing that s. 28 gives, not some of the powers but "*all* the powers," and it would require, to my mind, the strongest context to limit the powers conferred to a selected number among the powers. That brings me to the next stage in the argument, which is of this nature: It is said that when looked at s. 73 of the Settled Land Act is found to comprise two classes of powers—I am calling them "powers" for this purpose—and that they are powers of investment and powers in relation to the administration of settled land by which are meant sales, leases, and all the things that tenants for life generally do; and it is said (and this is what Vaisey J. held) that although s. 73 is included, it is only included for the limited purpose and to the limited extent of the non-investment powers contained in it. That argument is buttressed by a number of special arguments on certain words, to which I shall refer in a moment, but before doing so I would call attention to one or two matters upon the construction of s. 73 itself, because for the purpose of meeting this argument it is necessary to track down and discuss the assertion that s. 73 is dealing with two quite distinct classes of powers. It is to be noted that in the opening words of sub-s. 1, the matters to be dealt with in the following parts of s. 73 are described by these words: "Capital money . . . . shall . . . . be "invested or otherwise applied wholly in one, or partly in "one and partly in another or others, of the following modes." It is to be observed that the words "or otherwise applied" must imply that investment is treated as a method of application. In other words, the section is going to indicate the permitted methods of application, one of which is investment, and the others of which are described as "otherwise," but which are all methods of application. When the various heads in s. 73 are looked at, the word "investment" appears

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in para. (i) in reference to investment in trust securities; and I think I am right in saying that that is the only place in which the word occurs. In the paragraph which deals with the purchase of land it is not referred to as "investment" at all; the word "investment" does not appear. I have no doubt that land may be bought as (to use a rather loose expression) a purchase, for a purpose connected with settled land, or as an investment, or it may be bought partly as one and partly as the other; or again it may be bought by trustees, the tenant for life directing the purchase, with no particular ideas one way or the other. I am thinking of the purchase, for instance, of a neighbouring farm. That may be bought for the benefit of the settled land, or as an independent acquisition having benefits and merits of its own by way of investment. All that I am concerned to say is that it may be very difficult in relation to a purchase of land, to say whether it ought to be dubbed an investment or a Settled Land Act transaction. That difficulty appears in other paragraphs of s. 73, for instance para. (ii.), "in discharge, purchase, or "redemption of incumbrances affecting the whole estate." It may very well be that, if the money was available, it might be thought desirable, so to speak, to clear the estate of an incumbrance, regarding that operation as something done for the benefit of the estate. On the other hand, an incumbrance on the estate may be acquired as a pure investment, without any eye at all to the benefit or otherwise of the settled land. The charge, of course, would have to be kept alive; if allowed to merge and disappear it would be easier to say: "This "must have been bought for the benefit of the settled land." There is nothing to compel trustees who buy an incumbrance on the inheritance to allow it to merge in the inheritance; they may keep it alive for such purposes as they may find convenient in the future, including a pure investment purpose. There are other paragraphs which quite clearly cover both pure investment purposes and pure Settled Land Act purposes, mixed purposes, or uncertain purposes where nobody has really tried to decide what is the character of the operation in question. I say that merely in order to show that the idea that s. 73 itself provides a guide to the dividing line between investment purposes and settled land purposes is an idea which does not survive an examination of the section itself. There is no such clear line of demarcation to be found in the section, except possibly in regard to investments in trustee

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securities, which are defined as such. It seems to me, therefore, that there is no context to be found which is sufficient to cut down the meaning of the word "all" in s. 28, and that to take the view which commended itself to Vaisey J. (with which with all respect I am venturing to differ) does really involve putting a gloss upon the section, and saying that by the word "all" the legislature meant "all the administrative "or settled land powers conferred by s. 73, to the exclusion "of all other powers conferred by that section." I do not find myself able, so far as I have gone in the consideration of this section, to take that view.

Going back to s. 28, sub-s. 1, there are other words in it which I have not dealt with in this connexion, but which I must now deal with, because they form one of the bases of the defendant's argument. Attention is called to the concluding words of the sub-section, "All capital money arising under "the said powers shall, unless paid or applied for any purpose "authorized by the Settled Land Act, 1925, be applicable "in the same manner as if the money represented proceeds "of sale arising under the trust for sale." It is said that it is highly unlikely that the legislature would have provided for a different application, or for the right to make a different application, of the actual proceeds of sale arising under the trust for sale and capital money arising under the exercise of the imported Settled Land Act powers. That argument I appreciate, but it is then developed in this way: It is said that the words "unless paid or applied for any purpose "authorized by the Settled Land Act, 1925," according to their true construction, in that context, must exclude investments. The words "paid or applied for any purpose," it is said, are not apt to describe the operation of investment; and it is then said that the expression contemplates that the payment or application will be a payment or application exclusive of investment; and that, as the ambit of this part of the sub-section ought not to be treated as different from the ambit of the first part of the sub-section, it must follow that in the first part of the sub-section the powers are similarly limited so as to exclude investment. In my view, the argument breaks down at the outset, because the words "paid or applied for any purpose" appear to me to be amply capable of application not merely to what I have described as a Settled Land Act purpose, but also to an investment purpose. I link up that observation with the actual language of s. 73 of the

Settled Land Act itself, which, as I have said, treats investment as a method of application; and so far from those words pointing to a limitation of the s. 73 powers, they appear to me to be equally consistent, with an inclusion of the whole of those powers; and if that be the right construction of them, it will be consistent with, and will correspond to, the construction which I have provisionally put upon the opening words of s. 28. This argument is linked with the argument that I mentioned earlier in this judgment, that the words "in relation to the proceeds of sale" are to be read as meaning "in relation to land with regard to the proceeds of sale"; and that, it is said, would make the earlier part consistent with the limited scope of the concluding words. I have already said all that I wish to say with regard to that argument.

That really is the basic ground on which I disagree with the learned judge, and it may be summed up in these propositions: the powers given by the opening words of s. 28, sub-s. 1, include the powers of application and choice of application which are conferred by s. 73 of the Settled Land Act; the word "all" when applied to those powers, means "all," and there is no context sufficient to cut it down so as to exclude certain of those powers; there is nothing in this context to limit the powers to the powers of a tenant for life set out in Part II of the Settled Land Act; or to limit the application of s. 73 to powers which can properly be described as Settled Land or administrative powers. Had some word of a less recalcitrant nature than the word "all" been used, the defendant's argument would have been easier to support, but to my mind it is difficult to understand the argument that when Parliament uses the word "all" it leaves it to the ingenuity of the reader to find out that when Parliament has said "all" it means nothing of the kind; and if this section was to be intelligible to trustees and to act as a guide to them in the manner suggested, the use of the word "all" would be little better than a trap.

It is said, on quite broad lines, that the conception of trustees having power to invest in the purchase of land is, in a sense, a revolutionary conception, because under the old ideas, "investment" in respect of land meant investment in mortgages on land. One thing not to be lost sight of is that in the course of years investments by way of mortgage have been shown to have certain disadvantages, and anyone who has spent a lifetime in the law in dealing with these matters must remember many cases where what have appeared to be good mortgages on land have led to a variety of difficulties, and they are the sort of things that trustees have come to dislike. On the other hand, there has arisen in the course of recent years a liking by trustees for the purchase of land as an investment. House property and shop property has been found to be more desirable and more stable, and to involve fewer complications; and it would not shock me to find that the legislature in the year 1922 had an eye to that, and at any rate did not regard it as such a disastrous and revolutionary idea as the old-fashioned practitioner might have thought it to be. Another practice which has arisen in recent years is that of buying houses for the tenant for life to live in. Exactly when that practice began I do not know, but I cannot allow the fact that the idea of investment in land may be in a certain sense a novel one to lead me to construe what seems to be the definite language of Parliament in a sense limited in the way suggested. Although the idea is perhaps a novel one, I do not regard it as being so revolutionary that I should be justified in allowing my mind to be influenced by horror at a novel and revolutionary idea. I can only construe the words as I find them.

That I think disposes of the general question, and at any rate it is all that I find it necessary to say on the general question regarding the power to invest proceeds of sale in land at large; but that still leaves the separate question in regard to the investments which the trustees already hold. Those investments, historically, are derived from earlier sales of land, and it might be said that where trustees for sale have sold the land in pursuance of the directions of the settlement and have invested the proceeds, the whole of the trust for sale has been carried out, and therefore the powers given by s. 28, which are, so to speak, temporary powers pending sale, cannot be applied. I do not think that s. 28 is to be limited in that way. Verbally there is, indeed, something to be said for that view, for the reason that the powers conferred are powers in relation to the proceeds of sale; and it is said that once the proceeds of sale have been received and have been invested in, let me say, War Loan, they cease to be "proceeds of sale" for the purpose of s. 28, and are then properly to be described, not as proceeds of sale but as investments made out of the proceeds of sale. Therefore it is said that the power to invest in land must be limited in application to what in strictness can be called "proceeds of sale," that is to say, cash. I am not quite clear how far the limitation is said to go. "Cash," of course, is a loose expression. Nowadays it does not mean mere cash in one's pocket, but it includes a chose in action like money on current or deposit account at the bank. At some stage, according to the argument for the infant defendant, what starts as money received from a purchaser as the proceeds of a sale loses the character of proceeds of sale, and acquires a different character, namely, that of an investment; and Mr. Jennings quite logically accepted as the test, which he said must be a test to be applied upon the facts of each particular case, whether an investment had been made or not. To illustrate the sort of idea that he had in mind, I suppose if the money was paid into a bank or put on deposit it would still retain its quality of "proceeds of sale," but if the trustees had gone into the market and bought what was intended to be an investment, then that would not be "the proceeds of "sale," and it could not be sold in order that the proceeds might be applied in investments in land.

If I am right in my earlier observations, that s. 28 does empower the investment of cash proceeds of sale in land, it would be illogical—not that that is a thing which is unexpected in a section of this kind—to find that the power to invest in land stops at the moment when trustees invest, let me say, in a trustee security or any other authorized investment. It would have this further odd result, that if the trustees, having the proceeds of sale in the strict sense, apply them (as I have held that they can apply them) in the purchase of land, that land, under the paragraph which I have already read, is to be conveyed to the trustees upon trust for sale, and the trustees therefore are trustees for sale, and if and when they sell that land the proceeds of it in their turn may properly be invested in the purchase of other land; and therefore, so long as the trustees have got land and remain trustees for sale, they can, by a continuous chain of investments in land, keep the idea of investment in land going on for ever. On the other hand, the argument put forward on behalf of the defendant would involve this, which I again say would be illogical, that once the chain were broken by an investment not in land but in War Loan, the process would be brought to an end and the power to invest money in land would be killed, because the money could never again be "proceeds of sale." I realize that the question is a difficult one, and one of the solutions that Mr. Pascoe Hayward suggested does not appeal to me. It was that the concluding words of the main part of this sub-section provides that if money, the proceeds of sale, has been invested in a trust security, that money will have been invested under the powers of the Settled Land Act which gives power to change investments; and if by the exercise of that power the investment is sold, the money realized is then to be applicable, under the words of the sub-section, in "the same manner as if the money represented proceeds of sale "arising under the trust for sale," and that would bring those moneys representing the sale money from the investment back into the opening words of the section, and would give them the status of proceeds of sale, which would mean that they, in their turn, could be invested in land. I do not like that argument, which appears to me to be attributing to Parliament a circumlocution which ought not, I think, to be ascribed to it. I prefer the other way in which Mr. Pascoe Hayward put it, namely, that in spite of an investment, "proceeds of sale" within the meaning of the sub-section are properly to be said to exist so long as they can be traced. To take the simplest possible case, if 5,000*l.* is acquired by the sale of a house, and it is used to purchase War Loan, so long as that block of War Loan exists you can trace the proceeds of sale into it and regard it as being the proceeds of sale. In the case where there is an intermingling with other types, the result may be different. I do not want to be more precise than to say that I accept the argument that so long as the proceeds can be traced they remain "proceeds of sale" within the meaning of the sub-section. Whether or not in any individual case they can be traced must depend upon the facts of that case, and it is not desirable to say more about it than that. Fortunately, in the present case we are not in the least embarrassed in the application of that principle, because the investments in question do represent, in every case, the actual proceeds of the sale of land.

I think that I have dealt with all the important points, except, possibly, s. 32 of the Law of Property Act, to which some reference was made. That is a section which deals with cases of settlements of personalty, or of land held upon trust for sale where there is an express power to invest money in the purchase of land. Of course, that is dealing with a much wider class of settlement than is dealt with by s. 28 itself. It extends to personalty settlements, and it extends

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to cases where there is a power to invest in land included in a settlement of land on trust for sale; but the real object of that section appears to me to be to get rid of the sort of difficulty that arises where land is held on trust for sale and is therefore in equity regarded as personalty, and the settlement contains a power to invest money in the purchase of land without having what is very often omitted, namely, a direction that land so purchased shall be subject to the trust for sale; and that, of course, gives rise to the difficulty that where land is purchased under the power, it has the quality not of personal estate but of real estate. Section 32 enacts that in such a case the land purchased shall be held by the trustees on trust for sale.

There is one matter on s. 28 which I omitted to mention, and I think I should say a word about it. It is with regard to the words "unless paid or applied for any purpose "authorized by the Settled Land Act, 1925." I do not think it necessary to decide it, but it appears to me that there is very good ground for the view that those words are referring to the words contained in s. 73 of the Settled Land Act which provide that the capital money to be applied under the section is to be applied subject to the payment of claims properly payable thereout and to the application thereof to any authorized object for which the capital money was raised. One example of that would be where a mortgage is raised for some specific purpose, in which case that purpose has priority over the list of purposes set out in s. 73, and it seems to me that there is ground for thinking that the reference to "paid or applied for" an authorized purpose in s. 28 may be referring to that. I do not think it is necessary to decide that, I merely mention it because it arose during the argument.

This judgment has been longer than I had thought it would be, but the matter is a complicated and important one. In my opinion the judgment of the learned judge should be reversed, and there should be a declaration that the trustees are entitled to invest in the purchase of land not merely the cash (other than the War Damage cash) that they hold, but also the proceeds of the sale of investments they decide to sell.

SOMERVELL L.J. I agree, and in view of the judgment of the Master of the Rolls, in which he has considered the various arguments directed to the issues in this appeal, I can, I hope, state very briefly the main ground on which I differ from the learned judge. I will begin by quoting this sentence from his judgment. He said (1): "It is possible "to say that s. 73 is not an empowering section at all, but I "do not decide the case on that ground." I respectfully agree with the conclusion that the learned judge there indicates. I think it would have been impossible to exclude s. 73, having regard to the fact that the powers conferred by the opening words of the section are powers, inter alia, in relation to the proceeds of sale. Having reached the stage, therefore, that some powers at any rate in s. 73 are covered by the word "powers" in the opening lines of this section, I find it impossible, for the reasons which have been given by the Master of the Rolls, based upon the presence of the word "all," to come to the conclusion that one can on any principle select certain modes of investment authorized under s. 73 and eliminate others. That is briefly my reason for rejecting the main argument on behalf of the third defendant.

Other arguments were based on the later words at the end of the first paragraph of the section, and I will say a word or two about those arguments. Assuming that Mr. Jennings was right in submitting that the words which say what can be done with capital money were less extensive than the powers conferred in the opening words with regard to proceeds of sale, I could not myself have accepted that as a ground for cutting down what seems to me to be plainly conferred by way of powers in the opening two or three lines. I do not accept the submission that those later words in any way restrict what can be done with capital money. There seem to me to be two possible constructions which lead to that conclusion. One is that the words "paid or applied" cover all the modes (to use a neutral expression) set out in s. 73; the other is a construction which was referred to by the Master of the Rolls in the concluding part of his judgment, that the words "paid "or applied" in this context refer to the words in the initial sentence of s. 73, sub-s. 1, of the Settled Land Act. If that is right, then any capital moneys not so applied would be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale, and those words would I think make them subject to the same powers as the proceeds of sale referred to in the third line of the section. For those reasons I think the appeal should be allowed.

(1) [1948] Ch. 623.

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COHEN L.J. I agree, and as we are differing from the learned judge I think I should state shortly my reasons for my conclusion. As I follow the judgment of the learned judge, he bases his conclusions, in the main, on the view that the section was not intended to have what he regarded as the far-reaching and revolutionary effect of allowing, for the first time, proceeds of a trust for sale to be invested in the purchase of land; and he (it is his language, and not my own) grasps at two small straws to keep his main argument afloat. The first argument that he fastened on was the use in s. 28 itself of the words "including in relation to the land the powers "of management conferred by that Act during a minority," and he said (1) that those words "might be held to indicate "by a sort of inverse application of the ejusdem generis rule "that the powers previously mentioned were, or were analogous "to, powers of management." I have never heard before of an inverse application of the ejusdem generis rule, and I think it would be very dangerous here to attempt to cut down the wide words which precede this phrase by the application of any such principle. I think that the reason for the express mention of those particular powers, as contained in s. 102 of the Settled Land Act, was supplied by Mr. Pascoe Hayward in the course of his argument, when he pointed out that sub-s. 1 of that section begins with the words: "If and as "long as any person who is entitled to a beneficial interest "in possession affecting land is an infant"; and he pointed out that if there had not been that express mention of those powers the condition precedent to their existence might not have occurred with the result that the trustee would not have had the powers therein conferred. The second straw was s. 32 of the Law of Property Act, 1925, and with regard to that I entirely agree with the observations made by the Master of the Rolls, and I need add nothing upon it.

With regard to the main ground of the learned judge's judgment, it was based, I think, on two passages in the judgment of Uthwatt J., in *In re Wakeman* (2). The learned judge sets out those two passages in his judgment (3). The first passage is this: "As regards subject-matter the "main point of the section is not to encourage dealings in "land but to facilitate dealings with land, and to that end "powers are given which may be duly exercised if circum-

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(1) [1948] Ch. 620.

(2) [1945] Ch. 177.

(3) [1948] Ch. 616, 617.

" stances so require." Speaking for myself, I do not gain any assistance from that quotation. It is to be observed that it is only stated to be " the main point " of the section. With that I entirely agree, but it is quite consistent with that view that the subsidiary point is to enable the trustees in a suitable case to invest in land. The other passage was this : " No " doubt it is right, where there is used in a statute language " which is capable of more than one construction, to consider " and to take into account the consequences of alternative " constructions, and also previous legislation on the same " topic." I respectfully agree and no doubt that is particularly true, as Mr. Jennings pointed out, in the case of a consolidation statute ; but I think it is plain upon the authorities that even as regards a consolidation statute you cannot disregard what you consider to be the plain meaning of the language used, and I agree with the Master of the Rolls and my brother Somervell that there is nothing here sufficiently strong to enable us to disregard what I regard as the almost imperative word " all " in the initial words of the section.

I would add that I should be reluctant to be driven to the other conclusion, if only for the reason that if we were to accept the learned judge's judgment, it would leave the legitimacy of the transaction to depend not on the transaction itself but on the state of mind of the trustees who were effecting it, a situation which I should be very reluctant to believe was the intention of the legislature. There is one more thing that I desire to add. In the case of *In re Wakeman* (1), Uthwatt J. held that whatever might be the position so long as some land continued to be held on the trusts of the settlement, once all the land was sold the trust for sale had come to an end. That point does not arise for decision in this case, and in what I have said on the construction of this section I desire to reserve the question of what the position would be if at the time when the question of investment arose no land was held upon the trusts of the settlement.

For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors : *Smith & Hudson for Rollit, Farrell & Bladon, Hull, for all parties.*

(1) [1945] Ch. 177.

H. C. G.

VAISEY J.

1949 Mar. 16.

In re D. X. (AN INFANT).

Adoption—Applicants natural grandparents of child—Mother an infant—Matters to be considered by court—Adoption of Children Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 29).

An order authorizing the adoption of an illegitimate child by its natural grandparents is not outside the scope of the Adoption of Children Act, 1926, but it should only be made in the special circumstances of a given case, as there may be no final separation between the child and its natural mother; and the ostensible relationship of sisterhood so created between those who are in fact mother and child involves the risk of grave psychological strain and emotional disturbance to those concerned. Every case must, however, be judged on its own facts, dealt with on its own merits and decided upon a balance of considerations: and such an order can properly be made when the court has confidence in the good sense and judgment of the adopters.

The written consent of the mother, though herself under age, may be accepted by the court instead of being dispensed with under the Act.

APPLICATION under the provisions of the Adoption of Children Act, 1926.

The application was heard and argued in chambers.

Judgment was delivered in open court for the reasons stated therein.

Henry Salt K. C. and *H. E. Francis* for the applicants.

W. F. Waite for the official solicitor (guardian ad litem of the infant).

Cur. adv. vult.

VAISEY J. An interlocutory application in this matter relating to a point of procedure and the order made thereon by Roxburgh J. have already been reported in [1948] W. N. 377, and also—sub nom. re A. B. (an infant)—in [1948] 2 All E. R. 727. For that reason, and also because proceedings under the Adoption of Infants Act, 1926, are conducted in chambers, so that little information about the practice is afforded to the profession and the public, I have thought it desirable that the order which I am about to make in the present case should be made in open court.

The facts, as already disclosed in the reports, are briefly as follows: The applicants, husband and wife, wish to adopt, under the provisions of the Act, the illegitimate child, a girl of a few months old, of their own daughter, who at the time of the child's birth was barely sixteen years of age. I have been supplied with particulars of five cases in which the adoption by married persons of an illegitimate grandchild of theirs has, under the special circumstances of each case, been sanctioned by this court. Similar orders have doubtless been made in county courts and courts of summary jurisdiction. I do not for a moment suggest that orders of that description are outside the scope of the Act. I think, however, that they should be regarded as exceptional and made with great caution. Normally, an adoption presupposes a complete and final separation between the child and its natural parents. The child looks thenceforth to the adopters as its parents, and the natural parents, relinquishing all their parental rights and duties, step as it were for ever out of the picture of the child's life.

In the present case, on the other hand, the child and its natural parent must inevitably remain in association to a greater or lesser degree, and it is impossible to exclude the risk of grave psychological strain and emotional disturbance arising therefrom in the future, with consequences to them both which might be serious. The ostensible relationship of sisters between those who are in fact mother and child is unnatural and its creation might sow the seeds of grievous unhappiness for them both, and, indeed, for the adopters themselves. Every case must, however, be judged on its own facts, dealt with on its own merits, and decided upon a balance of considerations, and it is sufficient for me to say here that in the present case I have resolved to make the order asked for. Various undertakings on the part of the adopters with regard to the future were offered to me, all with the best intentions, but I prefer not to accept them, because my principal reason for making the order is my belief that I can rely with confidence on the good sense and good judgment of the adopters to handle the situation as it develops with wisdom and discretion. Let them never forget that they owe a continuing and inescapable duty to the young mother, as well as to the child, who will always be hers, however much my order may purport to make it theirs, and let them reconcile the claims upon them with anxious care. If difficulties arise, they can always make the child a ward of court, and the mother, too, so long as she is under age.

I am accepting the latter's written consent as sufficient, notwithstanding her youth, in preference to dispensing with

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it as I have power to do. I would only repeat that I by no means wish to encourage this type of application, and my decision in this case should be read as expressing my opinion that while such an order as I am now making is authorized in special circumstances, it ought never to be made as a matter of course.

The order will be in the usual form, and I will direct that the child be registered in the names selected by the adopters and as born on the date appearing in the certificate of her birth.

Order accordingly.

Solicitors: *Gibson & Weldon, for Bowcock & Pursaill, Leek; The Official Solicitor.*

F. R. D.

WYNN-PARRY J.
1949
Feb. 25.

GEORGE *v.* TOMPSON'S TRUSTEE.

Bankruptcy—Judgment debt—Garnishee summons for payment—Payment of amount into county court by garnishee—No consent by debtor to payment out to creditor—Order for payment out on application by creditor—Successive requests to county court officers to pay out—Failure by them to pay out owing to administrative breakdown—Receiving order against debtor's estate—Instructions by official receiver to officers of county court office to retain moneys—"Attachment "of a debt."—"Receipt of the debt"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59) *s.* 40, *sub-ss.* 1, 2; *s.* 41, *sub-s.* 1.

Under a judgment for the amount of a debt and for costs, the debtor failed to pay anything and the plaintiff issued a garnishee summons for payment of the total indebtedness and of the costs of that summons. These amounts were paid into the county court by the garnishee, and the plaintiff's solicitors wrote asking the debtor to consent to their being paid out. He did not answer, and the plaintiff applied to the county court for an order that the moneys paid in by the garnishee be paid out to the plaintiff. On the date of that application the court made the order prayed. On the same date the plaintiff's solicitors asked the county court officers to pay out to them accordingly but were told that it was contrary to practice to pay out moneys on court days. Applying again next day, they were told that there were not any funds, that the court officers would have to apply for funds to the Lord Chancellor's office, and that the money would be ready in four days' time. Accordingly, they applied again four days afterwards, only to be told that the money was still not forthcoming: and on the same day they were told by telephone that a receiving order had been made against the debtor's estate and that the officers of the county court had been instructed by the official receiver to retain the moneys which the garnishee had paid in. The receiving order had in fact been made four days previously, about a quarter of an hour after the plaintiff's solicitors' second application to the county court officers, for payment but the plaintiff did not know of it before the telephone message. Later, the defendant was appointed the debtor's trustee in bankruptcy.

On the present summons by the plaintiff to determine whether he had "completed the attachment" of the debt and had "received" it, within the meaning of s. 40, sub-s. 2, of the Bankruptcy Act, 1914, before the making of the receiving order:

Held, (1.) that the test was, not whether there had or had not been a garnishee order absolute, but whether the garnishee proceedings had resulted in actual payment before the making of the receiving order; (2.) that, in view of the weight of authority, the court—even if it took the view that s. 40, sub-s. 2, was not necessarily exhaustive in its definition—could not justifiably hold, on the issue of attachment or no attachment, that anything short of receipt of the money sufficed to enable the garnishor to obtain or keep the fruits of his judgment, notwithstanding that the defendant had no merits at all, that the plaintiff had taken every step that he could to make the attachment complete, and that the non-receipt of the money by the plaintiff at the date of the bankruptcy was entirely due to some breakdown in the administration of the county court; (3) that accordingly, the plaintiff had not "completed the . . . . attachment" of the sum and had not "received" it, within the meaning of the expression "an attachment of a debt is completed by receipt of the debt" in s. 40, sub-s. 2, before the making of the receiving order:

In re Fairley [1922] 2 Ch. 791; *In re Ford* [1900] 1 Q. B. 264; *Butler* v. *Wearing* (1885) 17 Q. B. D. 182; *In re Trehearne, Ex parte Chief Official Receiver* v. *Ealing Local Board* (1890) 63 L. T. 323; 6 T. L. R. 488, and *Ex parte Pillers. In re Curtoys* (1881) 17 Ch. D. 653 considered.

ADJOURNED summons to determine whether a creditor who had obtained a garnishee order in respect of a sum of money which had been paid into the county court had, by reason of having obtained an order absolute, attached the debt, the subject of the order, so as to be able to retain the benefit of the sum against the debtor's trustee in bankruptcy. On February 17, 1948, the plaintiff obtained judgment against the debtor for 38*l.* debt and 5*l.* 7*s.* 3*d.* costs. The debtor did not make any payment and, on February 24, 1948, the plaintiff issued a garnishee summons against another for payment of the exact amount of the judgment debt and

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of the costs of the garnishee summons. On February 28, 1948, the garnishee, in answer to the garnishee summons, paid 46*l.* 11*s.* 3*d.* into the county court and, on March 1, 1948, the plaintiff, by a letter from his solicitors, asked the debtor to consent to the money being paid out of court to him or to his solicitors. The debtor did not reply and, on March 18, 1948, the plaintiff applied to the county court for payment out of the amount paid in by the garnishee and, on the same day, the court ordered that 46*l.* 11*s.* 3*d.* (being 43*l.* 7*s.* 3*d.* plus 3*l.* 4*s.* 0*d.* the costs of the garnishee summons) be paid out. Also on the same day, the plaintiff's solicitors asked the officers of the county court to pay out those moneys to them, but were told that it was not the court's practice to pay out moneys on court days. They asked again on the next day and the county court officers told them that, as the county court banking account was not in funds, they (i.e., the officers) would have to apply to the Lord Chancellor's office for funds so that the account could be put in credit. The plaintiff's solicitors were assured that the necessary arrangements would be made by March 23, 1948. Accordingly, on that date, at about 10.30 a.m., they again asked the county court officers to pay out the moneys and were told that they were still unavailable as a remittance had not been received from the appropriate department of the Lord Chancellor's office. Later on in the same day, the solicitors were informed by telephone from the county court office that a receiving order had been made against the debtor's estate and that the officers of that office had been instructed by the official receiver to retain the moneys. That was the plaintiff's first knowledge of the receiving order, which had in fact been made on March 19 about a quarter of an hour before his solicitors' second application for payment out. Subsequently the defendant was appointed the debtor's trustee in bankruptcy and, by this summons, which was issued on December 7, 1948, the plaintiff asked whether he had "completed the attachment" of the sum of 46*l.* 11*s.* 3*d.* and had "received" it within the meaning of s. 40, sub-s. 2, of the Bankruptcy Act, 1914 (1), before the making of the receiving order.

(1) Section 40, sub-s. 1. "Where "a creditor has issued execution "against the goods or lands of a "debtor, or has attached any "debt due to him, he shall not be "entitled to retain the benefit of "the execution or attachment "against the trustee in bankruptcy "of the debtor, unless he has "completed the execution or

F. H. Lawton for the plaintiff. To all intents and purposes the plaintiff has "received" the debt within the meaning of s. 40, sub-s. 2. True, the money has not been paid out to him: but the intention of the court, in making the order, was that it should be; and it is not his, or anybody's, fault, that it was not. It is due simply to the facts that, owing to some hitch in the working of the court, the money was not available when the order was made and that, following on the receiving order, the official receiver gave instructions to retain it. The definition in s. 40, sub-s. 2, is not, however, exhaustive, but gives a description of one of the ways in which execution can be completed (see per Astbury J. in *In re Fairley* (1)) and, presumably, also attachment of a debt. The plaintiff comes within the definition sufficiently for it to be said of him that he has completed the attachment. In that case, there had not been "seizure and sale," but the execution was nevertheless completed. So here, there has been no "receipt" of the debt, but the attachment has been completed. *In re Ford* (2) was a different case, and Astbury J. distinguished it. True, in *Butler* v. *Wearing* (3) Manisty J. agreed with Lush L.J.'s view in *Ex parte Pillers, In re Curtoys* (4) that actual receipt of the attached debt by the garnishor was essential, and held that a judgment creditor, having attached a debt, did not become entitled to it unless he had received it before the debtor's bankruptcy. That would seem to be against the plaintiff, except for the fact that the garnishee proceedings

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"attachment before the date of "the receiving order, and before "notice of the presentation of "any bankruptcy petition by or "against the debtor, or of the "commission of any available act "of bankruptcy by the debtor."

Sub-section 2. "For the purposes of this Act, an execution "against goods is completed by "seizure and sale; an attachment "of a debt is completed by "receipt of the debt; and an "execution against land is completed by seizure, or, in the "case of an equitable interest, "by the appointment of a "receiver."

Section 41, sub-s. 1. "Where "any goods of a debtor are taken "in execution, and before the "sale thereof, or the completion "of the execution by the receipt "or recovery of the full amount "of the levy, notice is served "on the sheriff that a receiving "order has been made against "the debtor, the sheriff shall, on "request, deliver the goods and "any money seized or received "in part satisfaction of the "execution to the official "receiver . . . ."

(1) [1922] 2 Ch. 791.

(2) [1900] 1 Q. B. 264.

(3) (1885) 17 Q. B. D. 182.

(4) (1881) 17 Ch. D. 653.

in that case had not been completed, whereas here they have been. That, indeed, is the test. There has been a garnishee order absolute and the plaintiff had done all that he ought to, all that he possibly could, have done: and he ought not to lose his money simply because the receiving order was made before the order for payment out could be implemented.

N. H. Curtis-Raleigh for the defendant. The plaintiff has not " received " the debt within the meaning of s. 40, sub-s. 2. Even if the definition therein be not exhaustive, it must, as far as it goes, mean what it says: and it says that " attachment " of a debt is completed by receipt of the debt." Certainly there may be other ways: but there is nothing in the section to enable the plaintiff to establish that an order of the court which, before it can be implemented, is followed by the debtor's bankruptcy, is one of them. *Butler* v. *Wearing* (1) and *Ex parte Pillers, In re Curtoys* (2) are conclusive. In *In re Trehearne, Ex parte Chief Official Receiver* v. *Ealing Local Board* (3) Cave J. regarded *Butler* v. *Wearing* (1) as direct authority that only actual receipt was sufficient. In the present case, the fact that the garnishee proceedings were completed does not help the plaintiff if they had not been effectively acted on, as they had not. Before any payment had been, or could be, made to the plaintiff, the receiving order had been made and the official receiver's instructions given. From that point, the plaintiff could not do anything and, accordingly, cannot now establish that he has completed the attachment of the debt by receipt of it within the meaning of the subsection.

WYNN-PARRY J. This summons raises a not uninteresting question under s. 40 of the Bankruptcy Act, 1914, in circumstances which must be regarded—or which one must hope are to be regarded—as peculiar and unusual. I have to determine whether the plaintiff, who has obtained a garnishee order in respect of a sum of money which was paid into the county court, had, by reason of having obtained an order absolute, attached the debt, the subject of the order, so as to be able to retain that sum against the trustee in bankruptcy of the debtor. The facts are contained in an agreed statement of facts which has already been read and which I shall not repeat, so that my judgment proceeds on the basis of those facts.

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(1) (1885) 17 Q. B. D. 182.

(2) (1881) 17 Ch. D. 653.

(3) (1890) 63 L. T. 323; 6 T. L. R. 488.

[His Lordship then read s. 40, sub-ss. 1 and 2 and s. 41, sub-s. 1 of the Bankruptcy Act, 1914, and continued as follows :] I observe that in the definition section there is no definition of " execution " or " attachment."

This section and the sections corresponding to it in the earlier Acts have been the subject of consideration by the courts in a number of cases. I refer first to *In re Fairley* (1). The facts as stated in the headnote, are : " On January 14, " 1921, the sheriff, in executing a writ of fieri facias for 144*l*., " levied on the debtor's goods, but on January 29 being " paid 72*l*. on account of the debt in addition to costs, fees " and possession money, he withdrew by arrangement reserving " a right of re-entry for the 72*l*. balance. He retained the 72*l*. " received on account for fourteen days and then paid it " to the execution creditors. On March 16 the sheriff made " a second levy, but on being paid 53*l*. on account of the debt " in addition to fees and possession money, he again withdrew " reserving a right of re-entry for the 19*l*. balance. After " retaining the 53*l*. for fourteen days he paid it to the execution " creditors. On April 26 the sheriff made a third levy, " but the goods seized being found on interpleader to belong " to a third party, he finally withdrew and made a return " of nulla bona on May 2. On September 8 a petition in " bankruptcy based on an act of bankruptcy of August 19 " was presented. A receiving order was made on September 29 " followed by an adjudication on October 1 and an order " for summary administration on October 3." On those facts it was held by the Divisional Court, consisting of Astbury and P. O. Lawrence JJ., that the execution was completed under ss. 40 and 41 of the Bankruptcy Act, 1914, by the return of nulla bona on May 2 and that the trustee had no right to the two amounts realized by that completed execution. In his judgment, Astbury J. says (1) : " The question raised " by the trustee, and in regard to which the learned judge " below gave judgment in his favour, was whether he was " entitled to recover the 125*l*. paid to the appellants. The " trustee contends that his right to recover this money arises " under s. 40 of the Bankruptcy Act, 1914. The trustee

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(1) [1922] 2 Ch. 791, 795.

"suggests that unless there is a sale following a seizure the "execution cannot be completed within the meaning of that "section. That is plainly inaccurate, as in the very next "section (41) 'receipt or recovery of the full amount of the "'levy' is described as a completion of the execution. It is "plain therefore that in s. 40 the definition, or so-called "definition, in sub-s. 2, is not an exhaustive definition, but "a mere description of one of the many ways in which an "execution can be completed. Now the main and substantive "object of s. 40 is to prevent a judgment creditor retaining "the benefit of a partially finished execution if a bankruptcy "intervenes, and it enacts that unless the execution is completed it shall not be good as against the trustee. The "trustee's contention pushed to its logical conclusion would "lead to an absurd result. If an execution had been issued "nineteen years before a bankruptcy, and the execution "creditor had been paid the greater part of his money by "arrangement and the sheriff had retired but without any "seizure and sale the moneys could have been recovered "in the long subsequent bankruptcy. I do not believe that "that is the meaning of the section at all."

His Lordship then proceeded to consider certain decisions which had been relied on by the trustee in support of that contention on which he had just expressed an adverse comment. One of those decisions was *In re Ford* (1). That was a case in which, as stated in the headnote: "execution having been "issued upon a judgment for 80*l*. and costs, the sheriff on "December 31, 1898, levied under a writ of fieri facias. On "January 5, 1899, the debtor, under an arrangement with the "solicitors of the execution creditors, paid the solicitors a "sum of 40*l*. on account, and gave to the sheriff authority "to re-enter under the writ of fieri facias upon default in "payment of any of the instalments of the balance at the "agreed dates for payment. The sheriff thereupon withdrew. "On January 14 a receiving order was made against the debtor "on his own petition; at that date the sheriff had not "re-entered under the writ of fieri facias. *Held*, that the "execution had not been completed as to the 40*l*. at the date "of the receiving order, that the execution creditors were "therefore not entitled to retain the benefit of the execution, "and that the trustee in bankruptcy was entitled to the 40*l*.

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(1) [1900] 1 Q. B. 264.

"as part of the debtor's estate." As to this case, Astbury J. said (1): "I do not see how it could possibly have been held "otherwise. The sheriff withdrew under a distinct arrange-"ment that he could go in again, and before he had re-entered, "before the debt was paid off or the execution terminated, "the bankruptcy supervened . . . . Channell J. said: (2) "'If there has been only a partial execution, a levy and no "'subsequent completion, the intention of the Act apparently "'is that the other creditors may step in and insist on having "'the whole of the debtor's estate rateably divided. The "'test seems to be whether or no the execution has been "'partial only—that is, whether or no a partial benefit has "'been obtained from it; if the execution is in that sense "'incomplete, the general body of creditors are entitled "'to have the property distributed rateably'." Later he says (3): "'It seems that if the execution creditor gets a "'partial benefit (here he got 40*l.* on account) but retains "'anything in the nature of an incomplete execution, then "'he cannot retain the partial benefit which he has already "'received. If the respondents in the present case had "'accepted the 40*l.* in full satisfaction of the debt and had "'not claimed a right to re-enter at some subsequent time "'and go on with the execution, then I think they might "'have retained the 40*l.*'."

That judgment proceeded on the basis that at the date of the bankruptcy the execution was incomplete and, as I read the rest of the authorities which come within the purview of the examination made by Astbury J., the same may be said of them. As regards the construction of s. 40 it is true that, in that case, the Divisional Court only had to consider the phrase in s. 40 "an execution against the goods" of the debtor. As regards that, Astbury J. expressed the plain view that the definition in sub-s. 2 was not an exhaustive definition; but, as I read his judgment, he does not seek to distinguish between the quality of the definition of "an execution against "the goods" and the quality of the definition of "an "attachment of a debt," in the same sub-section. Indeed, it is a little difficult to say why one should come to the conclusion that the sub-section should be so construed as to attach a different quality to two definitions in the same sub-section. In my judgment, sub-s. 2 contains definitions which prima facie are not exhaustive but are merely by way of example.

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(1) [1922] 2 Ch. 791, 797.

(2) [1900] 1 Q. B. 264, 268.

(3) Ibid.

In regard to attachment, however, I have to consider certain of the earlier cases, particularly *Butler* v. *Wearing* (1). The facts, as stated in the headnote, were these: "A creditor "having obtained a garnishee order in respect of a debt due to "the judgment debtor, a third person intervened claiming that "the debt was due to her; and the garnishee, under an order of "the court, paid the amount into court to abide further order. "A receiving order having been subsequently made against "the judgment debtor, the third person withdrew her claim. "*Held*, that there had been no 'receipt of the debt' by the "creditor within the meaning of s. 45 of the Bankruptcy "Act, 1883, so as to entitle him to retain it against the "judgment debtor's trustee in bankruptcy." Manisty J., in his judgment, said (2): "As regarded garnishee orders "the decisions seem to me to have been conflicting. I think "that the decision in *Ex parte Joselyne, In re Watt* (3), is "difficult to reconcile with the subsequent decision in "*Ex parte Pillers, In re Curtoys* (4), where the Court of Appeal "held that the garnishor was not entitled to the protection "of s. 95, sub-s. 3, of the Act of 1869, unless he had obtained "actual payment of the attached debt before the order of "adjudication. If it were necessary for me to decide the "question, I think I should adopt the statement of the law "which is given by Lush L.J. in that case. He says (5): "'The intention was that so long as the execution remained "'only a security for the debt, it was not to be protected. "'Something more must have been done; there must have "'been an actual conversion of the security into money. "'And I think we must find some equivalent for that in the "'case of an attachment under a garnishee order. What "'is the equivalent? The security must have been realized "'before there can be any protection. How can the garnishor "'realize the debt which he has attached? The debt cannot "'be sold, and he can only realize it by obtaining payment "'of it from the garnishee, either voluntarily or by means "'of an execution upon his goods. Till that has been done

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(1) 17 Q. B. D. 182.

(2) Ibid. 185.

(3) (1878) 8 Ch. D. 327.

(4) 17 Ch. D. 653.

(5) Ibid. 666, 667.

" 'I think there is no protection. It is true the words " ' "executed by seizure and sale" have no application. " ' But I think they do show what was the meaning of the " ' legislature clearly enough to enable us to apply the principle, " ' and if, for want of apt words in the section, we were to say " ' it does not apply to a garnishee order, we should be incurring " ' the censure which is implied in the maxim, "qui haeret " ' " in litera haeret in cortice." I am of opinion that the only " ' equivalent for an actual sale of goods which will satisfy " ' the words of the Act in the case of a garnishee order is an " ' actual receipt of the attached debt by the garnishor. " ' Till that has been done the attachment is only a security, " ' and it is not protected by s. 95.' Now that being the view " which, were it necessary, I should be prepared to adopt, " I come to the consideration of the Bankruptcy Act of 1883. " Section 45, in effect, enacts that where a creditor has attached " any debt due to him, he shall not be entitled to retain the " benefit of the attachment against the trustee in bankruptcy " of the debtor unless he has completed the attachment before " the date of the receiving order and before notice of the " presentation of any bankruptcy petition. Sub-section 2 " defines what is meant by 'completing an attachment.' For " the purpose of the Act 'an attachment of a debt is completed " ' by receipt of the debt.' The question is what is meant " by the words 'receipt of the debt'? Is it, as Lush L.J. " said in *Ex parte Pillers, In re Curtovs* (1), an actual receipt " by the garnishor, or will some kind of constructive receipt, as " when the money is paid into court subject to further order, " satisfy those words?" Having dealt with the argument which had been advanced on that point, he says (2): "The " Act means what it says, that the attachment must be " completed by *receipt* of the debt. I think that the doctrine " of title by relation cannot be applied. The intention of " the legislature was to get rid of all the questions which " might have arisen before the Act was passed, and to put " the law upon a very simple and plain foundation. A " judgment creditor having attached a debt does not become " entitled to retain it unless he has received the debt before " the bankruptcy of the debtor. I am therefore of opinion " that in this case the trustee is entitled to judgment." It is plain that, in that case, so far as Manisty J. was concerned, he did not need for the purposes of his decision to hold that in no case could anything short of receipt of the money be sufficient, because of the facts of the case. There the garnishee proceedings had not been completed, and the case, as regards its facts, is really in pari materia with *In re Ford* (1) and the other cases reviewed by Astbury J. in *In re Fairley* (2). That case, however, *Butler* v. *Wearing* (3), was treated by Cave J., in the later case of *In re Trehearne, Ex parte Chief Official Receiver* v. *Ealing Local Board* (4), as a direct authority that there must be an actual receipt and that a constructive receipt would not do; and it appears from the examination of *Ex parte Pillers, In re Curtoys* (5), that the view of the Court of Appeal was that the test was, not whether there had been a garnishee order absolute or not, but whether the garnishee proceedings had resulted in actual payment, before the order, before adjudication.

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(1) 17 Ch. D. 653, 667.

(2) 17 Q. B. D. 182, 187.

It therefore appears to me that although there reside in the defendant in this case, as it is frankly admitted by his counsel, no merits at all and although on the agreed facts the plaintiff had taken every step which lay within his power to make the attachment complete and although the circumstance that at the date of the bankruptcy he was not in receipt of the money was due entirely to some breakdown in the administration of the court (all of which circumstances give rise to a feeling necessarily of the greatest sympathy for the plaintiff in this case) I cannot feel that I should be justified, in view of the weight of authority, in holding—even if I take the view that s. 40, sub-s. 2, is not necessarily exhaustive in its definition—that, on the question of attachment, anything short of receipt of the money is sufficient to allow the garnishor to keep the fruits of his judgment. Therefore, on the authorities as they stand and with the greatest reluctance, I feel bound to conclude that the plaintiff had not completed the attachment of the sum in question.

Solicitors: *Deacons & Pritchards, for Hawkins, Ferrier & Newnes, King's Lynn; Bowkers.*

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(1) [1900] 1 Q. B. 264.

(2) [1922] 2 Ch. 791.

(3) 17 Q. B. D. 182.

(4) 63 L. T. 323; 6 T. L. R. 488.

(5) 17 Ch. D. 653, 667.

K. R. A. H.

In re GREENE, DECD.
GREENE *v.* GREENE

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Nov. 19, 23, 24; *Dec.* 7.

Company—Transfer of shares—Article purporting to transfer shares on death—Validity—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 63.

The directors of a private company were desirous that their shares in the company should, on their deaths, pass directly to their respective wives. With this object a special resolution was passed on August 20, 1942, altering the articles of association (so far as relevant) in the following manner: " upon the death of any " . . . . director, if such director leaves a wife him surviving, " the . . . . shares of such deceased director shall, notwithstanding " any provision or direction made by such director in his lifetime " as to the disposition of such . . . . shares upon his death to " the contrary, be deemed to have passed upon the death of such " director to such deceased director's wife and such wife shall be " the only person recognized by the company as having any title " to the shares and shall forthwith be registered as the holder of " such . . . . shares . . . ." In 1945 one of the directors died intestate, leaving a widow and three children, two by a former marriage and one by the widow. He died possessed of a number of shares in the company and after his death these were registered in the name of his widow in accordance with the aforesaid article. On a summons to determine whether this article was valid; or, if it were to be held invalid, whether the widow was entitled to claim the beneficial interest in the shares as against the other persons entitled on intestacy on the footing of an imperfect gift or trust or contract:—

Held, (1.) that the article introduced by the special resolution of August 20, 1942, was contrary to s. 63 of the Companies Act, and accordingly invalid. An article in this form could not by-pass the personal representatives, and operate to transfer shares into the name of another person: (2.) that the widow could not claim the shares either by way of imperfect gift or trust, since the deceased remained throughout his life free to deal or dispose of the shares as he wished: (3.) that the widow was not entitled to the shares ex contractu; the article in question did not constitute a contract between the members of the company on the basis of s. 20 of the Companies Act, since a contract could not be based on an invalid article. Nor were the article and the special resolution evidence of an oral contract between the deceased and his co-directors that each of them would leave any shares of which he might die possessed to his widow, if he should leave one: and had such a contract existed the widow was not a party to it and could not have enforced it.

ADJOURNED SUMMONS.

Charles Alfred Greene, died on January 20, 1945, intestate,

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leaving a widow, Violet Greene, the first defendant, who was his second wife, and three children, namely, the plaintiff Ernest Charles Greene, and the second defendant Patricia Keeling-Williams (children of his first wife) and the infant defendant Paula Frances Lois Greene, the only child of his second wife.

Accordingly these four persons were between them entitled to the estate. The intestate was the registered holder at his death of 949 " A " shares and 1 " B " share in a company, known as Faulkner Greene & Co., Ld. This company had been formed in 1934 by the intestate and the defendant, Reginald James Faulkner, with the object of taking over, as it did, a glass merchants' business, hitherto carried on in partnership by the intestate and Faulkner at 99, Red Cross Street, Borough, S.E. The share capital of the company was at all times 3,500*l.*, divided into 3,495 " A " shares and 5 " B " shares, all of 1*l.* each. There was no difference in the rights conferred by the " A " and the " B " shares. The holding of one share of either class was a good qualification for office of director.

The defendants Faulkner, Spreckley and James were other directors of, and shareholders in, the company, whose interests might be affected by the question to be determined, and the remaining defendants were the wives of the defendants, Faulkner, Spreckley and James respectively.

The company was a private company and had articles adapting Table A of the Companies Act, 1929. Special Article 7 provided that no person should be recognized by the company as holding any share upon any trust, and the company was not bound to recognize any equitable interest in any share or any other rights in respect of it, except an absolute right in the registered holder. Special Article No. 8 was of a usual character, giving members prior rights to purchase any shares which another member wished to transfer. Clause 20 of Table A of the Companies Act, 1929, provides : " the legal personal representatives of a deceased sole holder " of a share shall be the only persons recognized by the " company as having any title to the share."

In 1942 a director of the company died, leaving his shares to his daughter. This event led to a discussion between the surviving corporators, namely, the intestate and the defendants James, Faulkner and Spreckley, and the following minute of a board meeting on May 27, 1942, appeared in the company's minute book : " It was proposed by Mr. Faulkner that the " articles of association be altered to provide that, in the " event of death of any of the present board of directors, the " shares held in their name shall be automatically transferred " to their wives and that the wife or wives shall be automatically and immediately appointed to the board of " directors and receive the same benefits as the other directors. " This proposal was unanimously approved and agreed " upon, and Mr. Faulkner instructed to call upon the " company's solicitors and have the articles of association " altered to embrace this decision." As a result of this proposal, a special resolution in the following terms was passed at an extraordinary general meeting held on August 20, 1942 : " That the articles of association of the company be altered " as follows :—(1.) by adding to Article 8 the following sub-cl. " to be numbered (*f*) namely :—(*f*) Provided that sub-cll. (*a*) " to (*e*) (inclusive) of this clause shall not apply in the case of " a transfer or transmission of the share or shares of any male " member of the present board of directors, that is to say " Reginald James Faulkner, Charles Alfred Greene, Harold " Magnus James and John Stanley Spreckley, arising upon the " death of any such director if such director leaves a wife him " surviving, in which event the share or shares of such " deceased director shall, notwithstanding any provision or " direction made by such director in his lifetime as to the " disposition of such share or shares upon his death to the " contrary, be deemed to have passed upon the death of " such director to such deceased director's wife and such wife " shall be the only person recognized by the Company as " having any title to the share or shares and shall forthwith be " registered as the holder of such share or shares in place of " such deceased director, and cll. 17, 18, 20 and 21 of Table A " in the first schedule to the Companies Act, 1929, shall not " apply to the transfer or transmission of shares arising under " this sub-cl. (*f*) in so far as they are not consistent with the " provisions of this said sub-cl. (*f*)."

Upon the death of the intestate it was resolved at a board meeting held on February 15, 1945, that the intestate's widow, the first defendant, should be registered forthwith as the holder of the shares held by her husband. This was carried into effect and she had been since and was now the registered holder of these shares and claimed to be the beneficial owner of them. The plaintiff, who was joint administrator of the intestate's estate with the first defendant, took out a summons to determine whether the said shares now formed part of the intestate's estate.

H. Lightman for the plaintiff.

I. J. Lindner for the widow, the defendant company and the defendants Faulkner, Spreckley and James and their respective wives.

The article introduced by the resolution of August 20, 1942, is valid and effective to pass the beneficial interest in the shares. The evidence shows that the intestate wished his widow to have the beneficial interest in the shares and this article was a perfectly legitimate method of effecting that purpose. When the resolution is examined, in the light of the circumstances leading up to it, it is clear that it was intended to alter the beneficial interest in the shares immediately. Even if the article by itself was not effective for this purpose, the widow would be entitled to claim the beneficial interest in the shares as against the other persons entitled on intestacy. The intestate showed a continuing intention that the widow should have these shares; the resolution and the article constituted an imperfect gift which was perfected when she took a grant of administration to his estate: see *Strong* v. *Bird* (1) and *In re James* (2). Alternatively the widow is entitled to claim the shares by contract. The contract was constituted in either of two ways: (*a*) the articles including the amended article, constitute a contract between the members and are binding on them: see s. 20 of the Companies Act (3); (*b*) The intestate and his co-directors orally agreed (as evidenced by the special resolution and the articles) each in consideration of reciprocal promises by the others, that after their respective deaths, the persons (if any) then their respective widows should become entitled to any shares then registered in them respectively. This multilateral contract took effect immediately for the benefit of the potential widows. Even if there were no contract, the special resolution or the article (or both of them) constituted a declaration of trust of these shares which took effect immediately, and operated to pass, on the intestates death, in favour of such person (if any) who should then be his widow, of such shares as were then registered in his name.

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(1) (1874) L. R. 18 Eq. 315.

(2) [1935] Ch. 449.

(3) The Companies Act, 1929, s. 20, sub-s. 1: "Subject to the "provisions of this Act, the "memorandum and articles shall, "when registered, bind the com-"pany and the members thereof "to the same extent as if they "respectively had been signed and "sealed by each member, and "contained covenants on the part "of each member to observe all "the provisions of the memo-"randum and articles."

Section 63: "Notwithstanding "anything in the articles of a "company, it shall not be lawful "for the company to register a "transfer of shares in or debentures "of the Company unless a proper "instrument of transfer has been "delivered to the company: Pro-"vided that nothing in this "section shall prejudice any power "of the company to register as "shareholder or debenture holder "any person to whom the right to "any shares in or debentures of "the company has been trans-"mitted by operation of law."

Parbury for the defendant Patricia Keeling-Williams.

The article introduced by the special resolution is invalid. Transmission of shares in this manner is contrary to s. 63. There was no proper instrument of transfer as required by the section ; and registration of the widow as holder of the shares according to the article was not by operation of law within the meaning of that section. It cannot be said that there was an imperfect gift, the intestate was throughout his life entirely free to do what he wished with the shares. The person designated by the article as his " widow " is uncertain, his marriage to the present defendant might have come to an end, and he might have remarried. A mere intention to give something but not carried out in the donor's life-time is insufficient to pass the interest, except by a properly executed testamentary document : see *In re Pink* (1). Similarly there can be no trust in favour of the widow. The shares were not bound during the intestate's lifetime, and the person to be benefited could not be ascertained until his death. If the article is invalid the widow cannot found her claim in contract. Although the articles may constitute a contract between the members, a claim could not be enforced in respect of an invalid article. The resolution did not constitute a contract between the intestate and his co-directors, an intention to alter the articles did not amount to mutual promises. Had there been any contract, the widow, who was not a party, could not have enforced it.

E. J. T. G. Bagshawe for the defendant Paula Frances Lois Greene adopted the argument of Parbury.

Lindner in reply. *In re Pink* (1) does not apply. This disposition is not testamentary, it took effect immediately the

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(1) [1912] 2 Ch. 528, 536.

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resolution was passed in favour of a possibly unascertained person, provided there were shares on which it could operate at the time of the intestate's death. It is not contrary to s. 63; this transmission as a result of this article is by "operation of "law" within the meaning of that section. It is none the less so because it happens not to be transmission to a personal representative. It is not suggested that personal representatives could actually be by-passed except where Parliament has so specifically provided. But there is nothing in s. 63 which prevents the special resolution and the article from constituting a declaration of trust in favour of the widow. If the articles were a contract which the widow could not enforce, it does not follow that the equitable interest will not pass to her in the circumstances of this case. It is perfectly competent for a man to create an obligation by contract during his lifetime, which after his death can be enforced against his estate, by declaring that his personal representatives are trustees for the person in whose favour the obligation was created: see *In re Flavell* (1) and *In re Davies* (2).

Parbury replied on the cases. *In re Flavell* (1) is distinguishable, that case turned on the construction of a particular document. The cases are summed up in *In re Gordon* (3). In the case of *In re Davies* (2) the society covenanted with the deceased in respect of an interest which he had not yet received, here the deceased never lost dominion over his property. He said that he would dispose of his property in a particular way, but that did not amount to a declaration of trust, there were no words apt to create a trust.

Cur. adv. vult.

Dec. 7. HARMAN J. read the following judgment: The first question which arises is as to the validity of the article introduced by the special resolution of August 20, 1942. Is it competent to a company by an article in this form to by-pass, so to speak, the personal representatives of a deceased holder of shares and to put them direct into the name of his widow? In my judgment, it is not. Such an article is contrary to s. 63 of the Companies Act, 1929 (now s. 75 of the Companies Act, 1948).

(1) (1883) 25 Ch. D. 89.
(2) [1892] 3 Ch. 63.
(3) [1940] Ch. 85.

I believe that the primary object of a section in this form, which first appeared in the Companies Act, 1928, was to scotch the then prevalent practice of providing for the oral transfer of shares to the great detriment of the Revenue, but in my judgment it applies to this or a similar case, for no proper instrument of transfer has been delivered, nor has the right to the shares been transmitted to the widow by operation of law. In my judgment, therefore, the registration of the widow was wrong and the register ought to be rectified accordingly by registering the shares in the joint names of the personal representatives, who are the plaintiff and the first defendant.

So far as the company is concerned there is an end of the matter, for it is not bound to recognize any equitable interest. The first defendant nevertheless claims that as between herself and the other beneficiaries under the intestacy she is beneficially entitled to the shares, and to this claim I must now turn. The widow puts her claim in three ways. Firstly she says that there was an imperfect gift to her of the shares which was perfected when she obtained a grant of administration to the donor's estate on the principle of *Strong* v. *Bird* (1) as extended by *In re James* (2). I can deal shortly with this. There was, in my judgment, no gift at all here. The intestate remained throughout his life completely free to deal with the shares, and his marriage to the first defendant might have come to an end and he might have remarried, in which case she would clearly not be the person having any claim upon them.

Secondly it is said that by the resolutions passed in 1942 a trust was created in favour of the first defendant. I cannot see that there was any trust here. Presumably it must have been created by something tantamount to a declaration whereby the intestate constituted himself a trustee for someone. I have already pointed out that the shares in his hands during his lifetime were in no way bound, and that the first defendant might not have been his widow at his death. If it be said that this was a trust to take effect on the intestate's death in favour of such person (if any) as should then be his widow in respect of such shares (if any) as he should then hold, this was an attempt to make a gift in a way which can only be effected by a testamentary document (compare *In re Pink* (3)), and of such there is no trace here.

(1) L. R. 18 Eq. 351.
(2) [1935] Ch. 449.
(3) [1912] 2 Ch. 528, 536.

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Thirdly the widow seeks to rest her claim in contract and she points first to s. 20 of the Companies Act, 1929, whereby the articles constitute a contract between the members. The answer to this is that such a contract could only be enforced by or through the company (*Welton* v. *Saffery* (1)), and an article which is, as I have held, ultra vires the company clearly cannot be so enforced.

Next, it is said that the resolutions, or one of them, constituted a contract between the intestate and the defendants Faulkner, Spreckley and James that each of them would, in consideration of a reciprocal promise by the other of them, dispose of his shares (if he had any at his death) in favour of his widow (if he left one), and that this is a contract of which specific performance might be decreed. I do not find that there was any such contract in fact, nor could the widow, who was no party to it, enforce it if there were. In truth these four persons wished to benefit their respective wives and were apparently advised that they could do so by means of the alteration of the articles which they in fact carried out. That alteration was ineffective and it follows that their intentions were frustrated, but sympathy for the widow cannot induce the court to invent a contract which no one had a mind to make.

I was pressed with two decisions: *In re Flavell* (2) and *In re Davies* (3), which it was said showed that a man can by contract made in his lifetime create an obligation which will be enforced against his estate (at any rate, by his creditors, and apparently also by beneficiaries) by means of declaring his representatives trustees for the persons for whose benefit the contract was entered into. Each of those cases, however, concerns something which was not the testator's property in his lifetime, and it seems to me that they have no application to that which, till the moment of his death, was the dead man's absolute and unfettered property.

I therefore hold that these shares form part of the intestate's estate beneficially as well as legally and must devolve accordingly.

Declaration accordingly.

Solicitors: *Tucker, Turner & Co.*; *Davidson, Doughty & Co.*

(1) [1897] A. C. 299, 315.
(2) 25 Ch. D. 89.
(3) [1892] 3 Ch. 63.

I. G. R. M.

ROMER
J.

1949

Jan. 27;
Feb. 16.

In re SCHOLFIELD'S WILL'S TRUSTS.

SCHOLFIELD *v.* SCHOLFIELD AND OTHERS.

Will—Specifically settled leaseholds—Value payments for war damage to settled leaseholds—Whether capital or income—War Damage Act, 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 10, *sub-ss.* 1, 2—*Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 79—*Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 20, *sub-s.* 1.

A testator by his will dated May 25, 1935, bequeathed leasehold properties on trust, until the death of the survivor of his children then living, to distribute the income as therein mentioned and the surplus annual income among his children for the time being living and issue per stirpes of any deceased child, and on the death of the said survivor to sell the properties and hold the proceeds on trust for the issue of certain of his children per stirpes. The testator died on September 22, 1942, leaving four children and certain remoter issue him surviving. Both before and after his death the leasehold properties suffered war damage. Value payments were made to the executors by the War Damage Commission under the War Damage Act, 1943.

Held, that so far as possible the value payments should be treated in the same way as the leasehold properties from which they were derived, and accordingly (following *Askew* v. *Woodhead* (1879) 14 Ch. D. 27) should be invested (subject to recoupment to capital of the war damage contributions) in the purchase of annuities for periods corresponding to the periods of the leases unexpired at the date of the damage. The annuities so purchased should be applied as though they represented the rents, profits and income arising from the respective leasehold properties.

ADJOURNED summons.

By cl. 4 of his will dated May 25, 1935, a testator gave freehold and leasehold properties to trustees upon trust "to "hold the rents profits and income" accruing therefrom on trust for his children and the issue, living at his death, of any child (except one named) who predeceased him. He further directed his trustees to prepare an annual account of his estate "making provision for repairs but without making "any provision for the depreciation of leasehold terms" and to distribute any surplus appearing in the account among the same group of beneficiaries. By cl. 6 the trustees were directed, on the death of the survivor of his children, to sell the properties and hold the proceeds in trust for the issue

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

per stirpes of his children (other than one named). The testator died on September 22, 1942, leaving four children and certain remoter issue him surviving. The leaseholds, from which the annual average income at the date of the will was about 2,778*l.*, suffered war damage both before and after the testator's death, and value payments in respect of the damage both to freeholds and leaseholds were made to the executors by the War Damage Commission under the War Damage Act, 1943. The leases, which had been disclaimed under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, were due to expire in 1960 or 1962, and the sum of 2,714*l.* per annum was required to provide for the income payments under the will, towards which the sum of 1,174*l.* per annum was available, apart from the value payments which, if invested, would yield about 150*l.* per annum. By this summons it was asked whether the value payments in respect of the leaseholds should be treated as capital, or as income, or should be apportioned between capital and income.

Cozens-Hardy Horne for the plaintiff, the trustee of the will.

Hesketh, for the defendants interested in income. Sums recoverable by way of capital should be so applied as between tenant for life and remainderman as the testator wished it to be done. It was clear on the construction of cl. 4 that the testator intended the children to have the full income from the leasehold properties and that persons interested in remainder should take their chance of what was left; he had, moreover, provided for a yearly accounting. There was nothing in the War Damage Act, 1943, to say whether or how apportionment should be made. Section 10, sub-s. 1, of the War Damage Act, 1943, dealt with the assessment of the amount of a value payment, and by sub-s. 2 the value of the hereditament in respect of which a payment was made should be computed by reference to the amount which the hereditament might have been expected to realize if sold at prices current on March 31, 1939. In the absence of directions in the statute, the assessment of value payments by reference to sale means that the court should treat them as if they were the proceeds of sale of settled leaseholds: see s. 79 of the Settled Land Act, 1929. Section 20 of the Trustee Act, 1925, will not apply because here there is no policy of insurance; the court was not thereby compelled to treat those payments as capital. They should be dealt with according to *Askew* v. *Woodhead* (1). In *In re Duke of Leeds* (2), money paid by the National Coal Board as compensation was treated as a wasting asset, and there was a similarity in respect of expendability between coal-mines and leaseholds. In *In re Thompson* (3) the ratio decidendi was that compensation paid for requisitioned leaseholds was not covered by the term "annual produce" and the person entitled to income could not claim it. By inference from s. 10, sub-s. 2, of the War Damage Act, 1943, and s. 79 of the Settled Land Act, 1925, the payments should be treated as income, and it would disturb the intentions of the testator to treat them as capital.

J. A. Wolfe for the defendants interested in capital. The payments should be received by the trustees and invested and the income only should come to the tenants for life, who would be relieved of substantial payments by a reduction in outgoings for repairs and other expenditure. In so far as s. 10 of the War Damage Act, 1943, treated the moneys as proceeds of sale it was merely a quantifying section. But the legislature generally directs how such moneys should be dealt with; there is a provision to that effect in para. 21, sub-para. 2, of Part IV. of sch. III. to the Coal Act, 1938: see *In re Duke of Leeds* (4). There was a similar provision in the Lands Clauses Consolidation Act, 1845. The War Damage Act, 1943, provides that contributions should be paid out of capital and that payments in respect of settled leaseholds should be made to the trustees, but there was no provision as to apportionment between capital and income, possibly because it was considered that s. 20 of the Trustee Act, 1925, applied. The true analogy is not sale but insurance. The term policy of insurance in s. 20 of that Act must be given a wide definition. The War Damage Act created a contract under which the State agreed to indemnify contributors against loss in return for premiums. This is a policy of insurance within the meaning of s. 20 of the Trustee Act, 1925, or so closely akin to it as to enable the court to follow the directions given in that section. [He referred to *In re Bladon* (5).]

(1) (1879) 14 Ch. D. 27.
(2) [1947] Ch. 525.
(3) Ante p. 1.
(4) [1947] Ch. 525, 542.
(5) [1912] 1 Ch. 45.

If there should be an apportionment it should be governed by *Askew* v. *Woodhead* (1), subject to recoupment of the contributions to capital.

Cur. adv. vult.

ROMER J. having stated the facts and set out the relevant provisions of the will, said: This originating summons has been issued in order to obtain the directions of the court as to the manner in which the value payments received, or to be received, should be disposed of by the trustees in administering the trusts of the testator's will. It was conceded, and rightly, at the hearing before me that the value payments which have been received from the War Damage Commission in respect of the testator's freehold properties should be treated wholly as capital and retained and invested by the trustees accordingly. Accordingly the question for decision is confined to the payments which have been or will be received in respect of the settled leaseholds.

Section 10, sub-s. 1 of the War Damage Act, 1943, is in the following terms: "Subject to the provisions of this part of "this Act the amount of a value payment shall be an amount "equal to the amount of the depreciation in the value of the "hereditament caused by the war damage, that is to say, "the amount by which the value of the hereditament in the "state in which it was immediately after the occurrence of "the damage is less than its value in the state in which it "was immediately before the occurrence of the damage." Section 10, sub-s. 2, provides how the value of a hereditament in any state shall be ascertained for the purpose of computing the amount of a value payment, namely, by reference to a notional sale on the hypotheses indicated by the sub-section and by para. 2 of sch. II. to the Act. Section 66 of the Act provides that contributions made under the Act shall be treated for all purposes as outgoings of a capital nature.

It will be seen that although s. 10 of the Act introduces the conception of a sale of the property which is the subject of a value payment, it only does so for one purpose, namely, the quantification of the payment which is to be made. The section does not provide that the value payment, when received, is to be treated as though it represented the proceeds of sale of the property concerned and the Act nowhere lays down the manner in which, as between tenant for life and

(1) 14 Ch. D. 27.

remainderman of settled property, a value payment is to be dealt with or disposed of.

Section 79 of the Settled Land Act, 1925, provides, so far as material, as follows: "Where capital money arising under "this Act is purchase money paid in respect of a lease for "years . . . . the trustees of the settlement or the court, "as the case may be . . . . may, notwithstanding anything "in this Act, require and cause the same to be laid out, "invested, accumulated and paid in such manner as, in the "judgment of the trustees or of the court, as the case may "be, will give to the parties interested in that money the like "benefit therefrom as they might lawfully have had from "the lease . . . . in respect whereof the money was paid, "or as near thereto as may be." Section 74 of the Lands Clauses Act, 1845, contained similar provisions to these and the Court of Appeal considered their effect in *Askew* v. *Woodhead* (1). In that case the appellant was entitled for life under a marriage settlement to leaseholds, which were taken under the powers of the Lands Clauses Act. At the time of their compulsory acquisition these leaseholds had eight years to run and the purchase money was sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds. The Court of Appeal held that the appellant was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run.

Section 81 of the Settled Land Act, 1925, deals with capital arising otherwise than under the Act but inasmuch as the question with which I am concerned is whether the value payments in issue are or are not capital, the section affords me no assistance.

Section 20, sub-s. 1, of the Trustee Act, 1925, is in the following terms: "Money receivable by trustees or any "beneficiary under a policy of insurance against the loss or "damage of any property subject to a trust or to a settlement "within the meaning of the Settled Land Act, 1925, whether "by fire or otherwise, shall, where the policy has been kept "up under any trust in that behalf or under any power "statutory or otherwise, or in performance of any covenant "or of any obligation statutory or otherwise, or by a tenant "for life impeachable for waste, be capital money for the "purposes of the trust or settlement, as the case may be."

(1) 14 Ch. D. 27.

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SCHOLFIELD'S WILL'S TRUSTS, *In re.* SCHOLFIELD *v.* SCHOLFIELD.

On behalf of the income interests which were represented before me it was contended that the value payments should be assimilated in treatment to proceeds of sale of settled leaseholds. On behalf of the remaindermen it was argued that such payments constitute, in substance, moneys paid under a policy of insurance and, as such, should be disposed of in accordance with s. 20 of the Trustee Act, 1925, or, alternatively, that they so closely resemble such policy moneys that the section should be applied by analogy.

In my judgment the value payments in question are neither proceeds of sale nor moneys paid under a policy of insurance. They resemble the latter more than the former, but the resemblance does not, in my opinion, attract the operation of s. 20 of the Trustee Act, 1925.

The testator in the case before me was at pains to ensure that the benefits incidental to his leaseholds should expire with the leaseholds themselves ; nothing was to be preserved for those interested in corpus. In the event the leaseholds have disappeared, not by expiry but by war damage followed by disclaimer. In their stead, however, are sums of money. If these sums of money are to be regarded as capital they will eventually pass intact to those who (until the date of ultimate distribution) would have taken no benefit in the leaseholds themselves, namely, the remaindermen ; and they will so pass at the expense of the income beneficiaries to whose immediate enjoyment the leaseholds had, by the will, been exclusively dedicated. It is clear that such a result would gravely disturb the manifest intentions of the testator as expressed in relation to his leasehold properties. The fact that money has, through wholly fortuitous circumstances, been substituted for an interest in property affords, in my judgment, no ground for effecting, in addition, a substitution of beneficial interests. Fairness of administration would appear to require that, so far as possible, the rights of the beneficiaries should survive the destruction of the property from which they derived the income which the testator gave them. Must, then, these rights be adversely varied by reason of any statutory requirement ? Not, as I think, by reason of s. 20 of the Trustee Act, 1925, because, as I have already indicated, the value payments have not been received under a policy of insurance ; they have been received from the State in pursuance of the compulsory scheme of indemnity laid down by the Act of 1943. Nor is any such requirement to be found in the War Damage Act itself, for that Act makes no reference to the matter at all. No other statute has, so far as I am aware, any bearing on the point and I am accordingly not constrained by any statutory requirement to treat these value payments as capital. Nor, in my judgment, am I so constrained by any previous decision of the courts. In *In re Bladon* (1), it was held by the Court of Appeal that where licensed premises form part of a settled estate and the licence is extinguished under the provisions of the Licensing Act, 1904, the proportion of the compensation allocated to the freeholder of the premises represents capital money of the estate. The decision, however, rested entirely upon the provisions of s. 2 of the Licensing Act, 1904, and those provisions clearly have no relevance to the present case. In *In re Thompson* (2), compensation was paid under s. 2, sub-s. 1 (*b*), of the Compensation (Defence) Act, 1939, on the de-requisitioning of leasehold property held on trust for sale. The tenant for life was entitled to the annual produce of the testator's residuary estate, of which the property in question formed part. Harman J. held that the compensation money could not properly be described as annual produce of the residuary estate, its proper description being, in effect, dilapidations. He accordingly decided against the claim of the tenant for life, but it seems to me that the circumstances of that case are far removed from the circumstances of the case before me.

In my judgment, I am accordingly free to decide, as I do decide, that so far as possible the value payments should be treated in the same way as the leasehold properties from which they were derived.

It would be right, I think, to recoup to corpus as capital contributions made under the Act of 1943. Subject to this being done, I will direct (following *Askew* v. *Woodhead* (3)) that each of the value payments ought to be invested in the purchase of an annuity for a period corresponding to the period which remained, at the date of the war damage, unexpired of the lease of the property in respect of which the payment was made. Such annuities will be applied by the trustees as though they represented rents, profits and income arising from the testator's leasehold properties.

Declaration and order accordingly.

Solicitors for all parties: *Hawker and Webb.*

(1) [1912] 1 Ch. 45.

(2) Ante p. 1.

(3) 14 Ch. D. 27.

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1949
Mar. 16, 18.

omervell and
vershed L.JJ.
nd
Vynn-Parry J.

In re KOENIGSBERG.
PUBLIC TRUSTEE *v.* KOENIGSBERG.

Estoppel—Res judicata by implication—Will—Bequest of Annuities free of tax—Will executed before September 3, 1939*—Testator dies in* 1941 *—Application to court in* 1943 *to determine whether Public Trustee's income fee payable by annuitants—Evidence filed on assumption (based on existing decision of Court of Appeal) that annuities were subject to reduction under s.* 25 *of Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30)*—Subsequent decision of House of Lords establishing s.* 25 *not operative to reduce annuities in such a case—Fresh summons between same parties to determine whether annuities payable in full—No estoppel by implication.*

A testator, who died in 1941, by his will dated June 23, 1936, appointed the Public Trustee to be executor and trustee thereof and gave to three beneficiaries annuities for their respective lives which he directed should be paid "free of income tax." He further directed the Public Trustee to appropriate three funds to answer the annuities and, subject to the payment of the annuities, he gave those funds to three hospitals. The testator also gave a number of pecuniary legacies ranking after the annuities and made a residuary gift. In 1943 the Public Trustee took out a summons to have it determined whether he should appropriate investments yielding sufficient income to pay the annuities and his income fee and pay the annuities clear of such income fee. The annuitants, the three hospitals, a pecuniary legatee and a residuary legatee were defendants to that summons. Shortly before the summons was taken out, the Court of Appeal had held in *In re Waring*, [1942] Ch. 426 that for the purpose of s. 25 of the Finance Act, 1941, a will was made when it was executed and that accordingly annuities given tax free in a will executed before September 3, 1939, were liable to be reduced in the manner provided by s. 25 although the testator died after that date. The assistant Public Trustee filed evidence in support of the 1943 summons showing that the investments representing the testator's estate would produce sufficient income to provide for the annuities reduced in accordance with s. 25 and the Public Trustee's income fee but that there would be no surplus to pay pecuniary legatees. This evidence proceeded, conformably with the *Waring* decision, on the assumption that s. 25 applied. It was clear on the figures that the estate would not be sufficient to pay the annuities in full not so reduced. Bennett J. made an order on the 1943 summons declaring, in effect, that the Public Trustee ought to appropriate investments sufficient to pay the annuities clear of his income fee. Subsequently the House of Lords held in *Berkeley* v. *Berkeley* [1946] A. C. 555, overruling *In re Waring*, that for the purpose of s. 25 a will was made at the date of a testator's death. It followed that s. 25 did not apply to these annuities and that they would be payable in full unless the annuitants were estopped by the previous summons and order from claiming to be so paid.

By this present summons the Public Trustee asked whether, having regard to the decision in *Berkeley* v. *Berkeley*, he ought to treat the annuities as not subject to modification in accordance with s. 25. The same persons were defendants to this summons as had been defendants to the previous summons of 1943. Roxburgh J. held that the question was res judicata by implication; that the annuitants were estopped from reopening the matter; and that the annuities were, and continued to be, liable to be treated as reduced in the manner laid down in s. 25.

From this decision the annuitants now appealed.

Held, allowing the appeal, that the question of the application of s. 25 to these annuities was not directly raised by the summons of 1943 or decided in those proceedings. The question whether the Public Trustee's income fee fell on the annuities or on the rest of the estate had nothing to do with the question whether s. 25 was applicable. The latter question was not res judicata by implication, for it was impossible to say that the order of 1943 could only have been made on the assumption that s. 25 applied. The annuitants were not under a duty to raise the question in 1943 in the sense that, if they did not then raise it, they would not be allowed thereafter to raise it.

The law as laid down in *Berkeley* v. *Berkeley* applied to these annuities. *Hoystead* v. *Commissioner of Taxation* [1926] A. C. 155 considered.

In re Waring (*No.* 2) [1948] Ch. 221 distinguished.

APPEAL from Roxburgh J. (1).

The testator Joseph Koenigsberg by his will dated June 23, 1936, appointed the Public Trustee to be executor and trustee thereof, bequeathed certain pecuniary legacies, and by cl. 3 bequeathed the following annuities to commence from the date of his death: (*a*) to his son the defendant Jacob Koenigsberg an annuity of 300*l.* during his life, to be paid free of all deductions whatsoever and free of income tax at the current rate for the time being deductible at the source, by equal quarterly payments the first whereof should be made three months after the testator's death: on the death of his said son or other sooner determination of the said annuity, the capital sum appropriated for the payment of such annuity as thereinafter provided to be paid to St. Bartholomew's Hospital absolutely. (*b*) To his daughter, the defendant, Ellaline Ballinger, an annuity of 182*l.* during her life similarly free of income tax: on her death or some determination of the said annuity, the capital sum appropriated for the payment of such annuity was to be

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(1) [1948] Ch. 727.

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paid to Guy's Hospital absolutely. (*c*) To his housekeeper, Theresa Solari (if in his employment at his decease), an annuity of 78*l.* similarly free of income tax, and on the death or sooner determination of the said annuity the capital sum appropriated for the payment of such annuity to be paid to the Westminster Hospital absolutely. Clause 3 then continued: "And I "direct my trustee to appropriate in respect of each such "annuity in his name investments of any nature hereinafter "authorized of an amount sufficient at the date of such "appropriation to answer out of the income thereof the annuity "in respect of which such appropriation is made and I declare "that such income shall be the primary fund for answering "the said annuity and the capital of the said investments "shall form the secondary fund for answering the same in "the event of the income proving insufficient and further "that after any such appropriation shall have been made "my residuary estate or the income thereof shall no longer "be liable to provide for the annuity in respect of which "such appropriation shall have been made."

By cl. 4 of the will the testator gave a number of pecuniary legacies, including a legacy of 1,000*l.* to the defendant Lillie Jacobs. These legacies were directed to rank after the annuities. By cl. 6 he gave his net residuary estate to the Public Trustee upon trust for a number of persons, including the defendants the Charing Cross Hospital.

The testator died on April 26, 1941. In 1942 the testator's widow made an application under the Inheritance (Family Provision) Act, 1938, and was awarded the weekly sum of 2*l.* 10*s.* 0*d.* In 1943 the Public Trustee took out a summons to which the three annuitants, St. Bartholomew's Hospital, Guy's Hospital, the Westminster Hospital, Lillie Jacobs and the Charing Cross Hospital were defendants asking: (1.) what provision he should make for the widow's weekly sum of 2*l.* 10*s.* 0*d.*; (2.) whether he ought to appropriate by way of provision for each of the annuities respectively investments yielding at the date of appropriation an income sufficient to meet the annuity and his income fee in respect thereof and ought to pay the annuitant the amount of such annuity clear of such income fee. The summons also asked how the investments appropriated to answer the income fee should be dealt with and by question 5 whether the Public Trustee ought to sell the reversionary interest in the sum appropriated to answer the widow's weekly sum. Bennett J.

on that summons made an order declaring, inter alia, that the Public Trustee ought to appropriate by way of provision for each of the annuities investments yielding at the date of appropriation income sufficient to pay to each annuitant the amount of his annuity clear of such income fee.

At the date when this summons was heard in 1943 it was thought that the decision in the Court of Appeal in *In re Waring* (1) was correctly decided. It was there held that for the purposes of s. 25 of the Finance Act, 1941, a will was made when it was executed and that section applied if the will was executed before September 3, 1939, although the testator died after that date. It was accordingly assumed that the three annuities given by the testator free of income tax should be reduced in accordance with the provisions of s. 25. In support of the summons of 1943 an affidavit was filed by Mr. Shuckburgh of the Public Trustee Office, in which he stated that the testator's net estate was approximately 30,000*l*. He then stated, cl. 5: " The estimated gross amounts " of the annuities bequeathed by cl. 3 of the said will as " modified by the provisions of s. 25 of the Finance Act, " 1941, are as follows" : then the amounts of the three annuities as so modified were set out, and they totalled 772*l*. 8*s*. 3*d*. Clause 6. " The income fee payable to the Public Trustee " in respect of the three annuities last above mentioned will " be approximately 15*l*. 10*s*. 0*d*. per annum. 7. The assets " of the testator's estate are just sufficient to enable funds " to be appropriated as provision for the weekly sum payable " to the defendant Minnie Koenigsberg under the said order " and for the three said annuities together with the income " fee thereon. The said appropriation will virtually exhaust " the assets and there will be no margin for the immediate " payment of the pecuniary legacies bequeathed by cl. 4 " of the said will. The fund appropriated to provide the said " weekly sum is however available for this purpose subject " to the life interest therein of the said Minnie Koenigsberg."

Subsequently, the House of Lords held in *Berkeley* v. *Berkeley* (2) that *In re Waring* (1) was wrongly decided and a will was made for the purposes of s. 25 when the testator died. It followed that on its true construction s. 25 did not apply to the testator's will and the three annuities were not affected by the section.

By this summons the Public Trustee asked whether, having regard to the decision in *Berkeley* v. *Berkeley* (2), he ought

(1) [1942] Ch. 426.

(2) [1946] A. C. 555, 565.

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KOENIGSBERG, *In re.* PUBLIC TRUSTEE *v.* KOENIGSBERG.

to treat the three annuities as not subject to modification in accordance with s. 25 of the Finance Act, 1941 and s. 20 of the Finance (No. 2) Act, 1945. The same persons were defendants to this summons as had been defendants to the summons of 1943, save that the annuitant Theresa Solari having died, her personal representative John Solari was made defendant as representing her estate.

Roxburgh J. held, following the decision in *In re Waring* (*No.* 2) (1) that the annuitants having been parties to the proceedings of 1943, in which the correctness of the decision of the Court of Appeal in *In re Waring* (2) had been admitted by implication, were estopped from reopening the matter on the ground of res judicata by implication. The two surviving annuitants and John Solari appealed.

Russell K.C. and *Michael Browne* for the appellants. The question is whether s. 25 of the Finance Act, 1941, applies to these annuities. When the summons of 1943 was issued the Public Trustee assumed that *In re Waring* (1) was rightly decided and that the annuities were reduced under the section. This is an exceptional case. The rule is that if between an order for appropriation and actual appropriation the value of the assets change so that there is a deficiency, it is necessary to go back to the court. If these annuities are payable free of tax there will not be enough to carry out a full appropriation and there will have to be some abatement on the lines of *In re Cottrell* (3). In that event, it will be necessary to go back to the Chancery Division for directions. The question is whether the annuitants are estopped from arguing what is admittedly the law. The second decision in *In re Waring* (2) is no authority in this case, as there there had been an express declaration of rights. It is suggested that this case falls within the principle in *Hoystead* v. *The Commissioner of Taxation* (4) and that the question is res judicata by implication, as the assumption that s. 25 applied was fundamental to the decision of 1943. The question whether s. 25 applied was not raised by the summons of 1943. To raise it, it would have been necessary to have the summons amended. The question is whether the order of 1943 could operate in circumstances other than those in which *In re*

(1) [1948] Ch. 221.
(2) [1942] Ch. 426.
(3) [1910] 1 Ch. 402.
(4) [1926] A. C. 155.

Waring (1) applied. It is clear that it could. There is no estoppel for the following reasons: First, the evidence relied on as creating an estoppel by implication was not essential, or indeed strictly relevant, to the order which concerned the annuitants; secondly, the question of fact and law is not fundamental to the decision; thirdly, the only question ligated so far as the annuitants were concerned was as to how the Public Trustee's income fee was to be paid. No declaration was made as to the amount to be set aside and no direction to appropriate was made. Supposing there had been ample funds to provide for the annuities whether s. 25 applied or not, the Public Trustee after *Berkeley* v. *Berkeley* (2) had been decided could not have appropriated on the basis that *In re Waring* (1) was the law. It is not possible to say that in 1943 the court decided this question.

Michael Browne in the same interests. The question of the incidence of the Public Trustees income fee would have arisen whether the estate were sufficient to pay the annuities in full or not.

M. J. Albery for the respondents Lillie Jacobs and the trustees of Charing Cross Hospital. The first question is whether there can be here estoppel by implication. The principle to be applied in determining whether a judicial decision raises such an estoppel is summarized in Spencer Bower "On Res Judicata," p. 104, as follows: "Where the decision set up as res judicata "necessarily involves a judicial determination of some question "of law or issue of fact, in the sense that the decision could "not have been legitimately or rationally pronounced by "the tribunal without at the same time, and in the same breath, "so to speak, determining the question in issue in a particular "way, such determination, though not declared on the face "of the recorded decision, is deemed to constitute an integral "part of it as effectively as if it had been made so in express "terms." That passage was written before *Hoystead* v. *The Commissioner of Taxation* (3) was decided and is based on old authorities. It is submitted that the order of 1943 could not have been made, or indeed carried out, except on the footing that the annuities were to be reduced in the manner laid down in s. 25. If it had been known that the principle laid down in *Berkeley* v. *Berkeley* (4) was applicable, there

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(1) [1942] Ch. 426.
(2) [1946] A. C. 155.
(3) [1926] A. C. 155.
(4) [1946] A. C. 555.

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would have been a deficiency and the estate would have been distributable on an actuarial basis, the principle of *In re Cottrell* (1) applying, and there would have been no question as to how the income fee was to be paid as none would have been payable. The size of the estate was relevant as showing the question to be decided. It is not necessary that the question should be raised in terms by the proceedings. But at least one possible answer to the question "Shall we appropriate "in manner A or in manner B?" is that no appropriation should be made at all. This case falls within the principle of estoppel by implication applied in *Reg.* v. *Inhabitants of Hartington, Middle Quarter* (2) and *Cox* v. *Dublin City Distillery Co., Ld.* (3). If an actuarial distribution had in fact been made on the basis of the decision in *In re Waring* (4), the respondents could not have asked to have that order varied when the House of Lords decided *Berkeley* v. *Berkeley* (5) as it did. The proceedings in 1943 were based on the assumption that there would be sufficient residue to make the appropriation. The ratio decidendi in *Hoystead* v. *The Commissioner of Taxation* (6) was that because a particular point had been impliedly decided in one year, the Commissioner of Taxation could not put that particular point in issue the next year, although a decision as to the basis of taxation in one year is not in general an estoppel as to another year. [He referred to *Inland Revenue Commissioners* v. *Sneath* (7).] The test is whether the court could have made the order which it in fact made but for the assumption in question. If it could not, the assumption is fundamental and the parties cannot subsequently raise the point, the principle of estoppel by implication then applying.

J. A. Reid for the respondents, the trustees of St. Bartholomew's Hospital and for the trustees of Guy's Hospital. This case more clearly resembles that of *Henderson* v. *Henderson* (8) than *Hoystead* v. *The Commissioner of Taxation* (6). The proceedings of 1943 were in essence administration proceedings. Whether a matter is res judicata in part depends on the nature of the proceedings. This is a case of duplicity of proceedings. The same principle applies in partnership actions. The partners must raise all the questions arising

(1) [1910] 1 Ch. 402.
(2) (1855) 4 E. & B. 780.
(3) [1917] 1 I. R. 203.
(4) [1942] Ch. 426.
(5) [1946] A. C. 555.
(6) [1926] A. C. 155.
(7) [1932] 2 K. B. 362.
(8) (1843) 3 Hare 114.

in connexion with the partnership. The annuitants should in 1943 have raised the question whether s. 25 applied or not. Not having done so, they cannot raise that question now. It is the duty of the parties to an originating summons to bring before the court all the material circumstances in connexion with the questions raised. In this type of case the parties are under a greater obligation to raise all material questions. There is no reason why the hospitals should now be in a worse position because the residue has not been distributed than they would have been in if it had.

G. C. D. S. Dunbar for the trustees of Westminster Hospital. This hospital is entitled to the fund which should have been appropriated to meet the annuity of the annuitant who has died. Whether a fund was or was not appropriated in fact to answer that annuity, it is submitted that the hospital should not be prejudiced by the appeal but that the principle enunciated by Lord Selborne L.C. in *Fraser* v. *Murdoch* (1) should be applied.

SOMERVELL L.J. The only question in this appeal is whether the issue as to the application of s. 25 of the Finance Act, 1941, to this will is to be decided as the House of Lords now have decided is correct in law, or whether the matter must be dealt with on the basis that it is res judicata in a sense other than that laid down by the House of Lords, by reason of proceedings which took place in reference to this will in 1943. On May 24, 1943, when a summons was taken out by the Public Trustee in respect of certain matters to which I will refer more in detail in a moment, there had been a decision of this court that in construing the words in the statute the relevant date was the date when the will was executed—in this case, 1936. On that basis the section, of course, applied to these annuitants, and instead of getting the sums named in the will free of income tax altogether, they had to bear a proportion of the income tax exigible in respect of the annuities.

The summons was taken out, as I have said, by the Public Trustee, and he asked various questions. The first related to a matter with which we are not concerned. After the testator's death his widow made an application under the Inheritance (Family Provision) Act, 1938, and was granted a weekly sum of 2*l.* 10*s.* 0*d.* out of the income of the net estate, and the first question in the summons dealt with that matter.

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(1) (1881) 6 App. Cas. 855, 865.

The main debate here arises on the second question, which I will read in full: "Whether the Public Trustee ought to "appropriate by way of provision for each of the said annuities "payable to the defendants"—and then their names are set out—"respectively investments yielding at the date of "appropriation an income sufficient to meet the said annuity "and the Public Trustee's income fee in respect thereof unless "commuted and ought to pay to the annuitant the amount "of such annuity clear of such income fee."

In my opinion that question raises, and raises only, the question as to how the income fee is to be dealt with. Is the Public Trustee, in addition to the investments necessary to produce the annuity amount, to appropriate a further amount to cover the income fee, or is the annuitant in effect to suffer that fee as a reduction from his annuity? Question 5 was: "Whether the Public Trustee ought to sell the rever-"sionary interest in the sum appropriated to provide for the "said weekly sum payable to the defendant Minnie Koenigsberg "or retain the said sum until her death."

An affidavit was filed in 1943 by Mr. Shuckburgh, of the Public Trustee Office. His Lordship read the relevant passages from the affidavit set out above and continued: Of course, those figures were on the basis of the decision of this court in *In re Waring* (1) and that this will was within s. 25. If, as the House of Lords later decided, the date of the testator's death was the date for the purposes of the section, that being April, 1941, the section did not apply and the annuitants were entitled to whatever were the additional sums over these sums there set out. If, on the reduced basis, the assets were just sufficient to enable funds to be appropriated, obviously, if substantially larger sums had to be paid the assets would have been insufficient to enable funds to be appropriated; and there is no dispute about that.

Bennett J. made an order, and in answer to question 2 he ordered: "That the Public Trustee ought to appropriate "by way of provision for each of the annuities payable to "the defendants" (then their names are set out) "respectively "investments yielding at the date of appropriation an income "sufficient to meet the said annuity and the Public Trustee's

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(1) [1942] Ch. 426.

"income fee in respect thereof and ought to pay to the "annuitant the amount of such annuity clear of such income "fee."

I agree with Mr. Russell's submission that that order, read, as one is, I think, entitled to read it, with the question and in its context, is not ordering the trustee to appropriate: he was ordered to do that under the will; but is declaring that, if and when he appropriates, he ought to appropriate an amount to cover the income fee. I do not think that at the moment I need deal with the other paragraphs of the order.

Since the date when that order was made two things have happened: First, one of the annuitants has died, and her estate is represented before us; secondly, the House of Lords, in *Berkeley* v. *Berkeley* (1) decided that *In re Waring* (2) was wrong and that the date for the purposes of s. 25 in relation to a will is the date when the testator died.

Those things having happened, the Public Trustee has taken out the present summons, and the first question that he asks is this: "Whether having regard to the decision of the "House of Lords in the case of *Berkeley* v. *Berkeley* (1), the "Public Trustee ought to treat the amount of the annuities "payable to the defendants"—then he sets them out, and they are the two who are alive and the one who is now dead—"under cl. 3 of the will of the testator as not being subject "to modification in accordance with s. 25 of the Finance Act "1941 and s. 20 of the Finance Act (No. 2), 1945." If question 1 is answered in the affirmative, various other questions arise with which it is unnecessary to deal.

An affidavit was filed on this application in which a Mr. Mears, of the Public Trustee Office, referred to the previous proceedings. He said: "The said order"—that is, the earlier order—"was "made on the footing that, since the testator's will was made "before September 3, 1939, although he died after that date, "the amounts of the annuities bequeathed by cl. 3 of the said "will . . . . . . were subject to modification under s. 25 "of the Finance Act, 1941." Then he sets out other matters which I do not think it is necessary to recite.

It was argued on behalf of those interested subject to the annuities that on the issue whether the will was made before or after September 3, 1939, Bennett J.'s order constitutes res judicata by implication. It was argued by Mr. Russell, on behalf of the annuitants, that that is not so and that they are entitled to have the will construed according to the law as it is now known to be and therefore they would get the benefit of having the sums named in the will paid free of tax.

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(1) [1946] A. C. 555.

(2) [1942] Ch. 426.

The question is whether, as between the parties to that summons and order—and those parties are here or are represented here—the court has decided that the law is as it was laid down in *In re Waring* (1). I would like at the outset to point out the distinction between this case and the second case of *In re Waring* (2), which came before Jenkins J. That is a sequel to the case to which I have already referred. In the first *Waring* (1) proceedings, this question as to the construction of s. 25 in its application to a will was directly raised, and it was on that issue as directly raised that the Court of Appeal decided that the date was the date when the will was executed. Then, of course, there was the decision in *Berkeley* v. *Berkeley* (3), and then the issue arose whether there was an estoppel by res judicata so that the trusts had to be carried out on the basis of what the Court of Appeal had decided or on the basis of what the House of Lords had later said to be the law. There were two annuitants. One was a party to the earlier proceedings and the other was not, and Jenkins J. decided that the one who was a party to the previous proceedings could not reopen the matter, because he would then have been seeking to reopen the very matter which had been decided in those earlier proceedings as between the same parties, but that the annuitant who had not been a party to those proceedings was not, of course, bound.

One thing is clear about the present case, and that is, that in the originating summons taken out in 1943 the question as to the construction of s. 25 in its application to a will was not directly raised in any of the questions. In spite of that, however, the learned judge decided that the matter was res judicata, and I will consider what he says in a moment.

I have already stated what is my construction of question 2 of the summons, and that is the only question as to which it could be suggested that the answer to it decided this point. It does not raise that issue on the face of it. Of course, the answer may impliedly decide it. The question as to what happens to the income fee when you appropriate investments for an annuity is a question which might arise under any estate, and under an estate in regard to which the *In re Waring* (1) problem never had arisen and never could arise. But what is said here is this. It is said that if you read the affidavit, the Public Trustee states expressly (and this is right) "I regard s. 25 as applying. On the basis that it "applies these are the figures. These figures practically "exhaust the funds"; and on the basis of that he asks both question 2 and question 5. It is said that if the *Berkeley* v. *Berkeley* (2) principle is applied quite different questions arise. The trustee, it is said, could not have appropriated in accordance with the directions in the will, because there would not have been sufficient investments to go round, and other matters would have arisen as to how he should carry out his duties. The court therefore answered the questions *on the basis* that s. 25 applied.

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(1) [1942] Ch. 426.
(2) [1948] Ch. 221.
(3) [1946] A. C. 555.

The learned judge relied in particular on a case of *Hoystead* v. *Commissioner of Taxation* (3). Other cases have been referred to, but that case and what was said in it, I think, remained the main authority on which those who support the submission that this matter is res judicata rely. It is important to see how the issue arose. There was in the year 1919 an assessment to land tax on trustees, and the trustees objected and made a claim to a deduction under s. 38, sub-s. 7, of the Land Tax Assessment Act, 1910–1916, of Australia. I will read the first part of that sub-section: "Where, under a settlement made before July 1, 1910, or "under the will of a testator who died before that day, the "beneficial interest in any land or in the income therefrom "is for the time being shared among a number of persons, "all of whom are relatives of the settlor or testator by blood, "marriage, or adoption, in such a way that they are taxable "as joint owners under this Act, then, for the purposes of their "joint assessment as such joint owners, there may be deducted "from the unimproved value of the land . . . . the aggregate "of the following sums namely: In respect of each of the "joint owners who hold an original share in the land under "the settlement or will (*a*) the sum of 5,000*l*."

The trustees claimed that they were entitled to deduct six sums of 5,000*l.* in respect of six beneficiaries. It will be seen that in order to succeed on that issue they had to establish that the testator died before July 1, 1910: they had to establish that the beneficiaries were relatives of the testator: they had to establish that they were taxable as joint owners: they had also to establish that they held an original share: and all those matters were set out expressly in the objection which the trustees took to the original assessment. The objection was disallowed by the revenue authorities, and the matter went to the High Court, and the questions were: "(1.) Whether the shares of the joint owners "or of any and which of them, in the land were original shares "within s. 38; (2.) How many deductions of 5,000*l.* the "respondent should make."

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(1) [1942] Ch. 426.
(2) [1946] A. C. 555.
(3) [1926] A. C. 155.

Now it is clear that the Commissioner of Taxation could have taken, but did not take, the point that the beneficiaries were not taxable as joint owners—the point was there on the face of the section and in the objection. He did not take it, any more than he took the point that they were not relatives. The court decided that they had original shares and that they were entitled to six deductions. This was a decision that the sub-section applied. In the subsequent year the Commissioner of Taxation sought to reopen the matter and to argue that there should be no deduction because these beneficiaries were not taxable as joint owners and the question was whether that issue had already been decided. No point seems to have been taken in this case, as was taken in another case in the same volume, that when you are dealing with income tax a question as to a subsequent year is not the same question as in the previous year, although all the relevant facts may be the same. No point of that kind seems to have been taken; but the Judicial Committee decided that the Commissioner of Taxation was estopped, because what he was seeking to do in the subsequent year was to say: "As you are not taxable "as joint owners, s. 38, sub-s. 7 does not avail you and there "should be only one deduction of 5,000*l.* instead of six." He was therefore seeking to obtain an order which was on the face of it and in form in direct conflict with the order which had been made previously. He was saying: "Whereas "the previous order said six deductions I want you to bring "that down to one deduction." He was also seeking a decision that s. 38, sub-s. 7, did not apply, whereas the court had decided that it did. The case is a good example of what happens when a party could take a point but fails to do so. It decides that in those circumstances he cannot in subsequent litigation get the matter (in that case, the applicability of s. 38, sub-s. 7), re-litigated on the basis of taking the point which he could have taken when the matter was previously before the courts. It does not, as a decision, cover the present case at all.

Roxburgh J. read a passage from that judgment which I will not wholly re-read, but I will re-read the latter part of it, because a good deal of the argument was based on the wording here. It says this (1): "Thirdly, the same "principle—namely, that of setting to rest rights of litigants, "applies to the case where a point, fundamental to the "decision, taken or assumed by the plaintiff and traversable "by the defendant, has not been traversed. In that case "also a defendant is bound by the judgment, although it "may be true enough that subsequent light or ingenuity "might suggest some traverse which had not been taken. "The same principle of setting parties' rights to rest applies "and estoppel occurs."

We were referred to a number of other authorities. There is a very famous passage from Wigram V.-C.'s judgment in *Henderson* v. *Henderson* (2), cited in *Hoystead* v. *Commissioner of Taxation* (3), which has often been quoted with approval. We were also referred to the case of *Regina* v. *Inhabitants of the Township of Hartington, Middle Quarter* (4). That was a case in which in the earlier proceedings (which were between the same parties) the question was where two unemancipated children were settled. That question could only be decided by deciding where their parents were settled, and it was therefore held in a later proceeding that the question where their parents were settled was res judicata.

But we have, as it seems to me, been referred to no case which covers the present case. The argument in the present case is not that what I call the *In re Waring* (5) point was necessary for the decision of any of the points put to and decided by Bennett J.; the argument is that the relevant questions would not have been put or would not have arisen except on the footing that the rights of the annuitants were on the basis that *In re Waring* (5) was right and that s. 25 applied.

(1) [1926] A. C. 155, 166.
(2) 3 Hare 114.
(3) [1926] A. C. 155, 170.
(4) 4 E. & B. 780
(5) [1942] Ch. 426.

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If the order as made by the court necessarily involves a finding (whether there was argument or not) on the point which is later sought to be litigated, the cases lay down that that point cannot be raised. That principle does not, in my opinion, cover the present case. The question is whether these words which I have read from *Hoystead's* case (1) (which must be read, of course, in their context) justify us in extending this principle to the present case. I have come to the conclusion, differing from the learned judge, that res judicata by implication cannot be established here. Mr. Reid argued, and I thought argued with force, if I may say so, that when you have administration proceedings of this kind the principles may be rather wider than they would be in an action with pleadings. That may be so. I agree that you have to look at each case on its own facts and that where you have proceedings by originating summons somewhat different questions may arise from the questions which arise when you are dealing with an action with pleadings. But I cannot myself hold that this order of Bennett J. must be regarded as deciding this issue. The two questions are entirely different. The question whether an income fee is to fall on the annuitant or on the rest of the estate has nothing to do with the question under s. 25. That has to be conceded. But then it is said that the annuitants, faced with what is set out in the paragraphs which I have read, ought to have taken the point if they ever wanted to take it afterwards, that they ought to have said: "Oh no; you have our figures wrong. *In re Waring* (2) "was wrongly decided. We want to go to the House of Lords "ourselves, or someone may subsequently go there, and we "desire to raise this issue." I think that if one imagines their doing so, what would obviously have happened illustrates the difficulties of the argument that there is here a case of res judicata. If that had happened, I think the judge might have said: "You must take out a summons yourself"; or he might have said: "If you want to raise that point "we must frame a new question," and a new question might have been framed and they might have taken the matter to the House of Lords. But I cannot see that they were under any duty to take that point.

The statements in the affidavit do not seem to me to be within the phrase "a matter traversable by the defendant." I agree that the word "traversable" contemplates pleadings rather than an originating summons. But when a trustee or anyone takes out an originating summons, he can make quite clear to those whom he has to bring before the court what point or points he wants decided, and it is for the defendants to raise and take points and file evidence which deals with the points which in the originating summons are put before the court for decision. I do not think they are called on to raise or deal with other and quite different points. But the point as to s. 25, as it seems to me, is plainly not put before the court for decision in this originating summons, and I cannot myself think that the defendants were under a duty to raise it—under a duty in this sense, of course, that if they did not raise it they would not be allowed thereafter to assert their rights under the law as it is now held to be.

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(1) [1926] A. C. 155.

(2) [1942] Ch. 426.

We have had an interesting argument on, and I agree, I think, with what is said in Spencer Bower "On Res Judicata" that questions of some nicety can arise, and I think that is perhaps particularly true of procedure by way of originating summons. Once one has got the general picture of what happened in 1943 and the principles laid down in the cases, one has to decide whether it falls within those principles or not. For the reasons I have tried to give, I think that the learned judge was wrong here, that the matter is not res judicata, and that the law as it has been laid down in *Berkeley* v. *Berkeley* (1) applies to the annuities under this will.

EVERSHED L.J. I agree. We have had the advantage of very full and careful arguments upon what has seemed to me to be a difficult question, namely, that of the application in this case of the so-called doctrine of estoppel per rem judicatam, as it is expressed "by implication." The argument on behalf of the respondents is that the annuitants represented by Mr. Russell are now by virtue of that doctrine estopped from asserting or claiming that the interests given to them under the will are the interests given according to the law of the land as laid down by *Berkeley* v. *Berkeley* (1).

I venture to think that it may be not unimportant to bear in mind, in approaching the problem, that this so-called doctrine of estoppel per rem judicatam is said to be justified on the theories, first of public interest, in the determination of disputes and second of the individual's right not to be

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(1) [1946] A. C. 555.

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vexed by multiplicity of suits. As I say, I venture to think it is not unimportant to bear the justification for the doctrine in mind in approaching this problem; for in a case in which it is alleged that beneficiaries under a will are estopped from putting forward their real claims though the estate is not distributed, I for one feel that the court should be satisfied with reasonable certainty that that doctrine does in truth apply.

As Lord Maugham observed in the *New Brunswick Ry. Co.* v. *British and French Trust Corporation Ld.* (1): "Not "all estoppels are 'odious'." Indeed, the justification for their existence proves that they are most salutary in very many cases. But, as I have indicated, in a case such as this and in circumstances such as exist here, I approach the problem feeling that the court should be clearly satisfied of the application of the doctrine before saying that it should be applied.

As the argument has developed it has seemed to me that there are two points (somewhat distinct) which have been raised. The first is that which may be identified with the *Hoystead* case (2), the question being, (to use the language in the *Hoystead* case which my brother has already read) whether a point fundamental to the decision of 1943 taken or assumed by the parties has not been traversed and is therefore to be treated as having been decided. The words or adjectives "fundamental," "assumed," and so forth, have to be examined in the light of the context in which they are used. It is, of course, quite plain that not only the plaintiff but all the parties, and the court, in 1943 assumed that the law was as the Court of Appeal had said it was. They could, indeed, do no other, unless they were going to dispute the validity of the Court of Appeal's decision in the House of Lords. It is also true that the Public Trustee in paras. 5, 6 and 7 of the affidavit filed in 1943 stated the financial position relevant to the question of the annuitants and also to the position of the testator's widow, who was then alive, on the basis that s. 25 of the Finance Act, 1941, would apply.

Mr. Russell argued, I venture to think with some force, that para. 7, which stated that there was only a sufficiency of assets to provide by appropriation for the annuitants and no more, was particularly directed, not to the question of the income fee and the annuitants, to which I will refer

(1) [1939] A. C. 1, 21.

(2) [1926] A. C. 155.

in a moment, but to the question whether the reversion to the sum set aside to provide the widow's 2*l.* 10*s.* 0*d.* per week should then be sold. But assume that that paragraph applied also, and would be read as applying also, to the annuitants and their position: is it nevertheless within the terms of the *Hoystead* (1) decision true to say that the assumption (which I agree was universally accepted) of the application of the Act of 1941 was fundamental to the decision at which Bennett J. arrived?

Roxburgh J. expressed it in this way: That if they (that is, the annuitants) had challenged the matter (namely, the financial statement about the annuitants and the estate and the assertion in reference to the Act of 1941), the order could not have been made without deciding whether the assumed application of the Act of 1941 was well founded or not. With all respect, I think that is putting it too high. The question as Mr. Russell formulated it, I venture to think rightly, was this: In making the appropriation which the will directed should be made, was the sum to be arrived at so that the annuitants bore the Public Trustee's income fee or not? And I am not satisfied that whatever the financial condition of the estate was or whatever was the view about the Act of 1941 that question could not properly have been determined without reference to the answers to these other problems.

Wynn-Parry J. during the course of the argument, adapting the phraseology from another case, put it thus: Supposing that the three paragraphs of the affidavit had been struck out, would there have been then no ground for Bennett J.'s decision? I think that, so formulated, the answer to the question is in the negative.

I say no more on that aspect of the case save this: the case should be tested, I think, by assuming that there had been no decision of the court in reference to s. 25 of the Act of 1941, but that the view which the trustee was then adopting was that which he stated in his affidavit. If afterwards the court had decided what the rights of annuitants in the circumstances of these annuitants were under the Act of 1941, would the decision as to the income fee have necessarily involved a determination in advance, so to speak, of the question of construction of the Act of 1941? I do not wish to add anything further on the point to what has fallen from Somer-

(1) [1926] A. C. 155.

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vell L.J. because in my judgment the answer to that question is in the negative.

But there still remains the second point, which is founded on the observations of Wigram V.-C. in the case of *Henderson* v. *Henderson* (1), of which I just cite a very short passage: "The "plea of res judicata applies, except in special cases, not only "to points upon which the court was actually required by "the parties to form an opinion and pronounce a judgment, "but to every point which properly belonged to the subject "of litigation, and which the parties, exercising reasonable "diligence, might have brought forward at the time."

It was said (and this point was particularly argued by Mr. Reid) that in a proceeding such as the proceeding which was before Bennett J. in 1943, in the nature of an administration action by way of originating summons, it is the duty of parties to that litigation to raise all points which appear to emerge (I hope I am not doing Mr. Reid an injustice in so expressing it) upon an examination of the application made and the evidence filed in support of it. Again, with all respect to Mr. Reid, I think that puts it too high. Wigram V.-C.'s observations, it is to be noted, make reference to multiplicity of litigation, referring to one of the basic theories upon which estoppel by res judicata rests. I think, for my part, it may well be that where multiplicity would otherwise be likely, there is a duty to raise points so as to prevent it; and I can see also, in reference to the point put by Mr. Albery, that if the summons raised in effect questions relevant to and in advance of an immediate distribution, then the parties to the summons should plainly raise all points which might affect the actual form of distribution and which it would, in many cases, or might be, too late to raise after the distribution had been effected. But that is not the case here. As I have already stated, no distribution was immediately contemplated in 1943, and as it seems to me, if Mr. Reid was right (and I think he has conceded as much) it would have been necessary for the parties seeking to raise the point to raise it in the form of some new question. I think that in circumstances such as those it is going too far to say that the observations of Wigram V.-C., which I have read, apply so as to invoke here or enable the parties to invoke against Mr. Russell the doctrine of res judicata.

I have added these observations of my own because we

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(1) 3 Hare 100, 115.

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are differing from the learned judge, but I also associate myself with what has already fallen from Somervell L.J. I only add one other observation in conclusion. Mr. Dunbar, for the Westminster Hospital, has a particular interest, because the fact is that following the order of 1943 there was an appropriation and one of the annuitants has since died and Mr. Dunbar represents the party who claims to be entitled under the will to the sum which represents the appropriation made to answer that annuity. He argues that whatever now is the position in view of the decision of this court, he must or should be entitled to raise and argue the point that the appropriation made in fact should not, so to speak, be unscrambled, but that he remains the only person entitled to the sum in fact put aside to answer Mrs. Solari's annuity. I express no view whether that is right or wrong. Certainly nothing I have said has been intended to pre-judge that question. For these reasons, I agree that this appeal succeeds.

WYNN-PARRY J. I agree. So far as the appellants are concerned, the lis in the 1943 proceedings was confined to question 2 of the originating summons. The fair construction of that question is, I think, this: Whether the appropriation when made should be of a sum sufficient to meet the annuity alone or to meet the annuity and the Public Trustee's fee payable in respect thereof. The object of the question is, I think, made quite clear by the last words, which are, " and " ought to pay to the annuitant the amount of such annuity " clear of such income fee." If that be the correct way of viewing question 2, then prima facie it was unnecessary, for the purpose of answering it, to consider whether or not s. 25 of the Finance Act, 1941, applied. It is true that the evidence in support of the originating summons taken out in 1943 in the affidavit of Mr. Shuckburgh contained the statements which appear in paras. 5, 6 and 7. In para. 7 it is said: " The assets of the testator's estate are just sufficient to enable " funds to be appropriated as provision for the weekly sum " payable to the defendant Minnie Koenigsberg "—that was the widow—" under the said order and for the three said " annuities together with the income fee thereon. The said " appropriation will virtually exhaust the assets and there " will be no margin for the immediate payment of the pecuniary " legacies bequeathed by cl. 4 of the said will. The fund " appropriated to provide the said weekly sum is however

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"available for this purpose subject to the life interest therein "of the said Minnie Koenigsberg."

Now that statement was necessary because of the form of question 5 in that originating summons, which was: "Whether the Public Trustee ought to sell the reversionary "interest in the sum appropriated to provide for the said "weekly sum payable to the defendant Minnie Koenigsberg "or retain the said sum until her death"; and the latter part of para. 7, which I have read, makes clear that this was the object of the statement. But it is said that in view of the statements in those three paragraphs the parties and the court must have proceeded on the basis that *In re Waring* (1) applies, because otherwise there would not have been sufficient to provide for the full amount of the annuities. Therefore, it is said that it follows as a matter of necessary implication that as between the annuitants and the parties with contrary interests the court decided that the annuitants were only entitled to be paid the annuities calculated on the basis of the principle enunciated in *In re Waring* (1). I cannot accept this. The parties came to the court to ask for an answer to a simple question of construction relating to appropriation. It must be borne in mind that the obligation to appropriate arises under the will. The Public Trustee did not ask whether he should appropriate or not. In answer to that question the court declared that when the Public Trustee appropriated he should do so on a particular basis: that is, making provision for his income fee. They made no order on him to appropriate. And here I think that the learned judge was wrong when he said that "accordingly the estate was sufficient to justify "the court in ordering the appropriations as specified."

In those circumstances, the question appears to me to be independent of any question whether *In re Waring* (1) applied or not. In *Regina* v. *Inhabitants of Hartington, Middle Quarter* (2), Coleridge J. in the course of his judgment, said: "Strike either of these facts out, and there is no ground for "the decision: these facts therefore were necessarily and "directly matter of inquiry." If one strikes out paras. 5, 6 and 7 of Mr. Shuckburgh's affidavit, it cannot be said that there was no ground for answering question 2 of the earlier summons. Those facts, therefore, were not necessarily and directly matter of inquiry.

(1) [1942] Ch. 426.

(2) 4 E. & B. 780, 794.

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It follows, therefore, that on question 1 of the present originating summons the appellants cannot be met by the plea of res judicata. I desire to add nothing to what has fallen from the other members of the court as regards the special point which was taken by Mr. Dunbar. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Bartlett & Gluckstein; W. R. Bennett & Co.; F. Cadgate & Co.; Wilde, Sapte & Co.; Trollope & Winckworth.*

B. A. B.

Reversed on the facts which were not before the judge. C.A. [1950] 1 All E.R. 747.

Reversed [1950] 1 Ch. 388

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Mar. 10, 11, 15, 16, 17; *Apr.* 6.

International law—Bar gold—Looted by Germans—Recovered by Allies—Account opened at Bank of England by United Kingdom and two foreign powers for disposal of gold looted by Germans—Deposit of gold bars at Bank of England for safe custody—Action against Bank for recovery of gold bars—Motion by Bank to set aside writ—Impleading foreign sovereign state—Doctrine of immunity.

The Bank of England held, for safe custody, sixty-four numbered bars of gold, which had been looted in 1944 by the Germans from a French bank which was holding them on behalf of the plaintiffs in the action, a French company. The bars were recovered in Germany and lodged with the Bank of England by the governments of the United Kingdom and two foreign powers for safe custody pending their ultimate disposal.

The French company commenced an action against the Bank of England claiming delivery up to them of the bars, an injunction restraining the Bank from parting with possession of them otherwise than as directed by the plaintiff company, and (alternatively) damages.

Applications were made to the court by two motions which for convenience were heard in reverse order. The first to be heard was a motion by the defendants, the Bank of England, to set aside the writ and all subsequent proceedings in the action, on the grounds that the bars of gold were in the possession of the three governments and that the action impleaded two foreign sovereign states which declined to submit to the jurisdiction of the court. The other motion (in the result ineffective) was by the plaintiffs,

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the French company, for an interlocutory order restraining the defendant Bank in the terms of the injunction claimed by the writ.

Held that the gold, notwithstanding its delivery to the Bank, must be regarded as still in the possession of the three governments for the purposes of the doctrine of immunity; that the court had no jurisdiction to entertain the plaintiff company's action; that the motion by the Bank succeeded; that all further proceedings in the action, including the plaintiffs' motion, must be stayed; and that the plaintiffs must pay to the defendants their costs of the action including both motions.

The Parlement Belge ((1880) 5 P. D. 197); *Compania Naviera Vascongado* v. *S.S. Cristina* ([1938] A. C. 485); *Ancona* v. *Rogers* ((1876) 1 Ex. D. 285); and *Twycross* v. *Dreyfus* ((1877) 5 Ch. D. 605) referred to.

MOTIONS.

The following facts are substantially as stated in his Lordship's judgment.

In May, 1939, the plaintiff, Dollfus Mieg et Compagnie S.A., a French company, carrying on the business of thread and yarn manufacturers, purchased from or through a Swiss bank sixty-four bars of gold and lodged them for safe custody with the Crédit Commercial de France at Limoges in a vault hired for the purpose in the name of the plaintiff company.

In August, 1944, the sixty-four gold bars were forcibly seized and removed from the Crédit Commercial de France by a detachment of German troops accompanied by German officials and carried off to Germany.

After the invasion of Germany by the Allied Armies the sixty-four gold bars were found by the United States Forces in the United States zone of occupation and passed into the custody of the United States military authorities, who placed them in the United States foreign exchange depository at Frankfurt.

On December 21, 1945, the Paris Conference on Reparation issued its Final Act (published by the Stationery Office as Command Paper Miscellaneous No. 1 (1946)) which recommended that the governments represented at the conference should sign in Paris, as soon as possible, in the terms of the draft agreement therein set forth, an agreement on reparation from Germany, on the establishment of an Allied Reparation Agency and on the restitution of monetary gold.

By an agreement in the terms or substantially in the terms of the draft set forth in the Final Act, dated January 14, 1946, and signed by the representatives of eighteen Allied

Governments (which was published by the Stationery Office as Command Paper Treaty Series No. 56 (1947)) provision was made (by Part I) for German reparations including (in Article 8A) a provision to the effect that a share of reparation consisting (in addition to a sum of dollars therein mentioned) of " all the non-monetary gold found by the Allied Forces " in Germany " should be " allocated for the rehabilitation " and resettlement of non-repatriable victims of German " action " ; (by Part II) for the establishment functions, and organization of an Inter-Allied Reparations Agency, to which each government was to appoint a delegate and an alternate to take the place of a delegate in his absence, including (in Article 2B) a provision to the effect that the agency should deal with all questions relating to the restitution to a signatory government of property situated in one of the Western zones of Germany which might be referred to it by the Commander of the zone (acting on behalf of his government) in agreement with the claimant signatory government or governments without prejudice, however, to the settlement of such questions by the signatory governments concerned either by agreement or arbitration ; and (by Part III) for the restitution of monetary gold, this Part consisting of a single article in the following terms : " Part III. Restitution of Monetary Gold. " Single Article. A. All the monetary gold found in Germany " by the Allied Forces and that referred to in para. G below " (including gold coins, except those of numismatic or historical " value, which shall be restored directly if identifiable) shall " be pooled for distribution as restitution among the countries " participating in the pool in proportion to their respective " losses of gold through looting or by wrongful removal to " Germany. B. Without prejudice to claims by way of " reparation for unrestored gold, the portion of monetary " gold thus accruing to each country participating in the pool " shall be accepted by that country in full satisfaction of all " claims against Germany for restitution of monetary gold. " C. A proportional share of the gold shall be allocated to " each country concerned which adheres to this arrangement " for the restitution of monetary gold and which can establish " that a definite amount of monetary gold belonging to it " was looted by Germany or, at any time after March 12, " 1938, was wrongfully removed into German territory. " D. The question of the eventual participation of countries " not represented at the Conference (other than Germany

" but including Austria and Italy) in the above-mentioned " distribution shall be reserved, and the equivalent of the total " shares which these countries would receive, if they were " eventually admitted to participate, shall be set aside to be " disposed of at a later date in such manner as may be decided " by the Allied Governments concerned. E. The various " countries participating in the pool shall supply to the " governments of the United States of America, France and " the United Kingdom, as the occupying powers concerned, " detailed and verifiable data regarding the gold losses suffered " through looting by, or removal to, Germany. F. The " governments of the United States of America, France and " the United Kingdom shall take appropriate steps within the " zones of Germany occupied by them respectively to " implement distribution in accordance with the foregoing " provisions. G. Any monetary gold which may be recovered " from a third country to which it was transferred from " Germany shall be distributed in accordance with this " arrangement for the restitution of monetary gold."

The agreement also contained (in Part IV) provisions as to its coming into force and signature under which (according to a note in the Stationery Office Print) it in fact came into force on January 24, 1946.

In September, 1947, the governments of the United Kingdom, the United States and France set up a Tripartite Commission for the restitution of monetary gold for the purpose of applying the terms of Part III of the agreement of January 14, 1946. The only official document in evidence in these proceedings regarding the setting up of this Tripartite Commission consisted of a copy of a French government order dated September 27, 1947, but it was agreed in the course of the argument that complementary action on corresponding lines could be assumed to have been taken by the other two governments concerned, namely those of the United Kingdom and United States. The French government order (according to the exhibited translation) prescribed the constitution, organization and functions of the Tripartite Commission in the following terms: " The President of the Provisional Government of the Republic, " the Minister of Foreign Affairs and the Minister of Finance. " In view of the decree of March 5, 1946, promulgating the " agreement on reparations to be received from Germany, " on the establishment of an Inter-Allied Reparation Agency, " and on the restitution of monetary gold, signed in Paris

" the 14th of January, 1946. Be it ordered :—Article I.— " For the purpose of applying the terms of Part III of the " agreement on reparation from Germany, on the establishment " of an inter-allied reparation agency and on the restitution " of monetary gold, the Government of the Republic has " decided in agreement with the Governments of the United " States of America and the United Kingdom of Great Britain " and Northern Ireland to establish a Tripartite Commission " for the restitution of monetary gold complying with the " following dispositions : The Tripartite Commission for the " Restitution of Monetary Gold. 1. For the purpose of " putting into effect Part III of the Paris agreement on " reparation of January 14, 1946, the governments of the " United States of America, of France, and the United Kingdom " of Great Britain and Northern Ireland have decided to form " a commission called 'Tripartite Commission for the Resti-" 'tution of Monetary Gold.' 2. Each of the three Govern-" ments will nominate for the 27th of September, a Commission " to represent them at the Commission. 3. The Tripartite " Commission for the Restitution of Monetary Gold will be at " Bruxelles but is independent of the Inter-Allied Reparation " Agency already established there. The Commission has " the right to communicate in the name of the three govern-" ments concerned, with the Allied Governments members " of the Inter-Allied Reparation Agency, by the intermediary " of accredited delegates of those Governments with the " Agency, with the Inter-Allied Secretariat of the Agency, " and, if need, with the other governments concerning the " questions arising out of Part III of the Paris Agreement " on Reparations. 4. The official languages of the Tripartite " Commission for the Restitution of Monetary Gold will be " English and French. 5. The attributes of the Tripartite " Commission for the Restitution of Monetary Gold are the " following : (*a*) To instigate and receive from the governments " claiming a right to participate in the distribution of monetary " gold found in Germany or which may be recovered from a " third country to which it was transferred from Germany, " claims for the restitution of gold looted from it by the Germans " or wrongfully removed to Germany ; the claims will have " to be supported by detailed and verifiable indications " regarding loss suffered. (*b*) To examine claims received " and to determine the share of each claimant government " in the gold pooled for distribution as restitution in compliance "with Part III of the Paris Agreement on Reparation and "all other agreements relating thereto. (*c*) To make known "at a date required the total value of the monetary pool "that has become available for the purpose of distribution "as restitution. (*d*) When all the claims for restitution "have been received and decided upon, to make known "the portion of the pool of monetary gold available as "restitution to each of the countries qualified to participate "in its restitution. (*e*) To co-operate by all the means which "the three governments forming the Commission may "establish for the distribution of the pool of monetary gold "to be disposed of as restitution. (*f*) To take all administrative measures which might be necessary for the carrying "into effect of the tasks enumerated in the sub-paras. (*a*) "to (*e*) inclusive, subject always to the preceding general "observations; to open and operate banking accounts; "to enter into contracts for the purpose of fulfilling all the "necessary tasks. The expenses of the Commission appurtenant to its mission will constitute a prior charge on the "monetary gold pool to be distributed. 6. The decisions "of the Commission will be made by its members unanimously. "Article 2—The present order will be published in the Official "Journal of the French Republic. Made in Paris, the 27th "September, 1946."

In 1947 a questionnaire to governments, designed to elicit information required to enable the Tripartite Commission to carry out its functions, was issued by the Tripartite Commission and for the purposes of this questionnaire the term "monetary gold" was defined as follows: "All gold which "at the time of its looting or wrongful removal was carried "as part of the claimant country's monetary reserve, either "in the accounts of the claimant government itself, or in the "accounts of the claimant country's central bank or other "monetary authority at home or abroad." It is to be noted that the sixty-four gold bars, having been at the date of their seizure by the Germans the private property of a thread and yarn manufacturing company, did not fall within this definition of "monetary gold." On the other hand the definition in question did not form part of the agreement of January 14, 1946, which in fact contained no definition either of "monetary "gold" or of "non-monetary gold."

In March, 1948, a "Gold set-aside Account" was opened at the Bank of England in accordance with the terms of a letter from His Majesty's Treasury dated March 9, 1948, and the Bank's reply thereto dated March 11, 1948. These letters were as follows: "March 9, 1948. My Lord and Sir, "I am directed by the Lords Commissioners of His Majesty's "Treasury to request you to open a gold set-aside account "in the name of His Majesty's Treasury on account of 'the "'governments of the United States, the United Kingdom "'and France.' This account will be operated by the "representatives of the governments of the United States, "the United Kingdom and France on the Tripartite Commission "for the Restitution of Monetary Gold, for the deposit and "eventual distribution of a portion of the gold looted by "Germany from the Occupied States of Europe and recovered "by the Allied Occupation Forces. The authorized representatives of the three above named governments are as "follows" [then follow the names of representatives for the United States of America, the United Kingdom and France] "I am directed to inform you that the above named representatives are authorized to communicate directly with you and "to give you all the instructions they may consider necessary for "the operation of this account. Such communications should "be signed by a representative of each of the three above "named governments. I am further directed to inform you "that their Lordships will arrange for a letter of introduction "from His Majesty's Treasury to accompany the first "communication from the above named representatives. "I am," etc.; the letter was signed by an official of the Treasury, and addressed to the Governor and Deputy Governor, Bank of England.

The Bank's reply, dated March 11, 1948, addressed to the Secretary of His Majesty's Treasury, was as follows: "Sir, "In accordance with the request contained in Mr. Rowe-"Dutton's letter of March 9, I am directed to state that a "gold set-aside account has today been opened in the books "of the Bank of England in the name of—His Majesty's "Treasury o/a the Governments of the United States, the "United Kingdom and France, to be utilized for the deposit "and eventual distribution of gold coming under the jurisdiction of the Tripartite Commission for the Restitution "of Monetary Gold. Due note has been made that operations "on this account may be effected over the joint signatures "of one authorized representative of each of the three "governments concerned, the names of which representatives "were given in the letter referred to. It is also noted that "the first communication to the Bank of England from these "representatives will be routed via His Majesty's Treasury "for purposes of authentication. I am to add that the Bank "would propose to make charges in connexion with this account "on the basis indicated in the semi-official letter from "Mr. Gunston to Mr. Maitland of January 28, 1948. I am" etc.—the letter was signed by the Assistant Chief Cashier. The Bank's proposal in the last paragraph of the letter of March 11, 1948, as to the charges to be made in connexion with this account were accepted, so that the Bank became a "bailee for reward" of gold deposited to the account in question.

In the meantime, the plaintiff company, having apparently been pursuing inquiries as to the whereabouts of the sixty-four gold bars, a claim in respect of them dated June 29, 1948, was presented to the United States Occupation Authorities through a Colonel J. L. Bonet-Maury of the French Mission for Restitution. This claim was dealt with by a Colonel William G. Bray of the United States Army, as Chief of the United States Foreign Exchange Depository at Frankfurt, who replied to it by a letter dated June 29, 1948, in the following terms: "To Colonel J. L. Bonet-Maury, French Mission for Restitution, APO 403 U. S. Army, June 29, 1948. Receipt "is acknowledged of your claim No. OFR 869, dated April 30, "1948, in connexion with certain gold bars which were lost "by Dollfus Mieg & Cie, and claimed to be held by the "Foreign Exchange Depository. It is understood that you "merely desire to ascertain the location of these bars in "Germany in order to support the claim of Dollfus Mieg & Cie, "that they were looted from that company. In order to "facilitate your proof of this claim, you are advised that the "sixty-four gold bars, the numbers of which are listed on the "attached sheet which bears my initials, are presently located "in the Foreign Exchange Depository. As you know, the "disposition of this gold is subject to the orders of the Tripartite Gold Commission and the Office of Military "Government for Germany (U. S.) especially with respect "to claim and further dealings in connexion with this matter "should be taken up with these agencies," signed by Colonel Bray as Chief of the Foreign Exchange Depository.

In July, 1948, the sixty-four gold bars (part of a larger consignment of gold) were conveyed to England and deposited

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with the Bank of England in the gold set-aside account. This was clearly done under the orders of the Tripartite Commission or the three constituent governments, who seem rightly or wrongly to have treated the sixty-four gold bars as " monetary gold " within the meaning of the agreement of January 14, 1946, and therefore as falling to be dealt with under the provisions of Part III of that agreement.

On July 16, 1948, the Secretary General of the Tripartite Commission (at the instigation of the French Delegation of the Inter-Allied Reparations Agency) wrote from his office in Brussels a letter to the Bank of England in the following terms : " Sir, I am directed by the Commission to write " with regard to the following question. 2. The Commission " has received a request from the representative of France " on the Commission that certain gold bars which are included " in the second consignment from Frankfurt, now on its " way to the Bank of England, should be set aside pending " receipt by the Commission of a communication from the " French Government. 3. These bars, net weight of which " is stated to be 789 kg. 72654, are said to have been formerly " the property of the Société Française Dollfus-Meig, looted " by the Germans in 1944, and to have been recently identified " among the bars at Frankfurt. 4. The Commission understands that the French Government is considering a claim " for restitution which it has received from the Société " Dollfus-Mieg and that its intention is to request the Commission to have these bars set aside, if such action is possible, " and included in any future delivery which the Commission " may decide to make to France. The bars would thus be " available for restitution by the French Government to " the Société Dollfus-Mieg should the French Government " so decide. 5. A list containing all available particulars " concerning these bars is attached hereto. A comparison " with the inventories forwarded to you under cover of the " Commission's letter C/BE 498, dated July 6, 1948, shows " that the major portion, if not all, of these bars appear to " be contained in [certain boxes referred to in the letter " listed as mentioned in the letter]. The Commission would " be grateful, providing such action does not present insuperable " technical or administrative difficulties, if you could see " your way to having these bars set aside intact on arrival, " if they can be identified, pending receipt of a further " communication from the Commission on the subject.

"7. The bars are described as Russian Mockba bars (with "acceptable London assays) which are normally good delivery "bars and there will presumably be no difficulty over assessing "their value for the Commission's account."

To this letter the Bank replied on July 19, 1948, as follows: "Dear Sir, I write to acknowledge the receipt of your letter "(C/BE 523) of July 16 regarding the allocation to the French "of specific bars. The proposal which you make is acceptable "to the Bank of England provided that at the time we receive "the authority of the Commission to hold the gold at the "disposal of the Bank of France we also receive instructions "from them to ship the gold from London. As you are "aware, it is now contrary to the Bank of England's practice "to set aside specific bars in the name of a customer, but "if the French act as indicated above it will not be necessary "for the Bank to do more than hold the gold at the disposal "of the Bank of France. I might perhaps add that the Bank "have been able to identify all but one of the bars shown "on the schedule enclosed in your letter. The unidentifiable "bar is shown in the first column and numbered 11090" and the weight was stated. That was signed for the Chief Cashier of the Bank.

No action was taken on these two letters and on their arrival at the Bank of England the sixty-four gold bars were simply deposited in the "Gold set-aside Account" and have remained so deposited.

The plaintiff company contended that inasmuch as the sixty-four gold bars were indisputably identified as those which, being the plaintiff company's property, had been forcibly taken and carried away by the Germans, they ought, on identification, to have been forthwith restored to the plaintiff company and were not and should not have been treated as "monetary "gold" within the meaning of Part III of the agreement of January 14, 1946. In support of this contention reliance was placed in particular on (i) the Tripartite Commission's definition of "monetary gold"; (ii) the United Nations Declaration on Axis Acts of Dispossession dated January 5, 1943 (published by His Majesty's Stationery Office as Command Paper Miscellaneous No. 1 (1943)) by which (so far as need be stated for the present purpose) the Allied Governments declared their intention to do their utmost to defeat the methods of dispossession practised by the governments with which they were at war, and reserved all their rights to declare invalid any transfers of or dealings with property which was or had been situated in the territories which had come under the occupation of the governments with which they were at war, or which belonged or had belonged to persons (including juridical persons) resident in such territories, whether such transfers or dealings had taken the form of open looting or plunder or of transactions apparently legal in form even when they purported to be voluntarily effected; this declaration, read in conjunction with the explanatory notes attached to it, being relied on on behalf of the plaintiff company as amounting to a declaration that the policy of the Allied Governments was to secure that identifiable goods looted by the Germans (as for example the sixty-four gold bars in the present case) should be the subject of restitution to their true owners; and (iii) on Law No. 59 promulgated in 1947 by the United States Military Government in the United States zone of Occupation which made provision for the restitution of identifiable property in terms which (according to the plaintiff company) were applicable, and should have been applied, to its claim for restitution of the sixty-four gold bars.

By a letter from its solicitors to the Bank of England dated September 24, 1948, the plaintiff company made a formal claim to the sixty-four gold bars. This letter having produced no satisfaction the plaintiff company by a writ dated October 18, 1948, commenced against the Bank of England as defendant the action in which the application is made. The relief claimed by the writ as originally framed comprised: (1.) Delivery to the plaintiff company of the sixty-four gold bars: (2.) an injunction restraining the Bank its servants and agents from selling charging dealing with or parting with possession of the sixty-four gold bars or any of them otherwise than as directed by the plaintiff company: (3.) further or other relief: (4.) costs.

After service on the plaintiff company of notice (dated November 2, 1948) of the motion on the part of the Bank, the plaintiff company on March 8, 1949, (pursuant to leave obtained on the previous day) amended the indorsement of the writ by adding to the claim for delivery up of the sixty-four gold bars a claim for damages for their detention and by inserting as an alternative to the claim for delivery up a claim for damages for conversion of the sixty-four gold bars. The Bank by their present motion applied to the court for an order that the writ and all subsequent proceedings in the action might be set aside on the grounds (as stated in the notice of motion): "1. That the sixty-four bars of gold in the writ "mentioned are in the possession or under the control of the "governments of the U. S. A., the Republic of France, and "the United Kingdom of Great Britain and Northern Ireland: "2. and that this action impleads two foreign sovereign "states namely the governments of the United States of "America and the Republic of France who decline to submit "to the jurisdiction of this honourable court."

Sir Valentine Holmes K.C. and *Geoffrey Cross* for the Bank of England.

Sir Frank Soskice S. G. and *Danckwerts* for the Crown (as amici curiæ). The foreign governments are most anxious that their attitude should not be regarded as unreasonable. They consider themselves, in a sense, trustees of these gold bars, whether they are "monetary" or "non-monetary" or neither. It is for that reason that the foreign governments adopt the attitude which is known to the court.

Sir Andrew Clark K.C. and *R. O. Wilberforce* for the plaintiff company.

Cross replied.

The following authorities were referred to in the course of the arguments: *The Parlement Belge* (1); *Compania Naviera Vascongado* v. *S.S. Cristina* (2); *The Porto Alexandre* (3); *The Gagara* (4); *The Broadmayne* (5); *The Messicano* (6); *The Crimdon* (7); *The Jupiter* (8); *The Jupiter (No. 2)* (9); *The Jupiter (No. 3)* (10); *The Arantzazu Mendi* (11); *The Amazone* (12); *Gladstone* v. *Mussurus Bey* (13); *Morgan* v. *Larivière* (14); *Twycross* v. *Dreyfus* (15); *The Tervaete* (16); *Haile Selassie* v. *Cable & Wireless Ld.* (17); *Aksionairnoye Obschestvo A. M. Luther* v. *James Sager & Co.* (18); *Wilson*

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(1) (1880) 5 P. D. 197, 203.
(2) [1938] A. C. 485.
(3) [1920] P. 30.
(4) [1919] P. 95.
(5) [1916] P. 64.
(6) (1916) 32 T. L. R. 519.
(7) (1918) 35 T. L. R. 81.
(8) [1924] P. 236.
(9) [1925] P. 69.
(10) [1927] P. 122, 250.
(11) [1939] P. 37, 49; [1939] A. C. 256.
(12) [1939] P. 322.
(13) (1862) 1 H. & M. 495.
(14) (1875) L. R. 7 H. L. 423.
(15) (1877) 5 Ch. D. 605.
(16) [1922] P. 259, 272.
(17) [1938] Ch. 545, 839, 844.
(18) [1921] 3 K. B. 532.

v. *Anderton* (1); *Ballantyne* v. *Mackinnon* (2); *Biddle* v. *Bond* (3); *Wetherman* v. *London and Liverpool Bank of Commerce Ld.* (4); *The Winkfield* (5); *Lincoln Waggon and Engine Co.* v. *Mumford* (6); *The Davis* (7); *Long* v. *The Tampico* (8); *Republic of Costa Rica* v. *Strousberg* (9); *Duff Development Co. Ld.* v. *Kelantan Government* (10); *Ancona* v. *Rogers* (11); *Vavasseur* v. *Krupp* (12).

Reference was also made to Halsbury's Laws of England, 2nd ed., vol. 1, pp. 64, 724; Stephen's Commentaries, 19th ed., vol. 2, pp. 208, 216; Westlake's Private International Law, 7th ed., pp. 267, 275; and Dicey's Conflict of Laws, 5th ed., p. 195.

Cur. adv. vult.

April 6. JENKINS J., reading a judgment, stated the facts and continued: The evidence in support of the motion on the part of the Bank includes evidence showing that the governments of the United States of America and the Republic of France decline to submit to the jurisdiction of the court in this matter, and that the Bank has been desired by these governments and also by the government of the United Kingdom to take the objection to the jurisdiction of the court on which the motion is based.

I am not now concerned with the validity of the plaintiff company's claim to the effect that its title to the sixty-four gold bars, which admittedly were its absolute property at the time of their seizure by the Germans, has not been displaced by the course of events above narrated.

The sole issue before me is whether (as contended on the part of the Bank) the present action, brought in pursuance of that claim, is ex facie one which this court has no jurisdiction to entertain by reason of the well-known principle of international law (which I will term "the principle of immunity") whereby immunity from process in the municipal courts is accorded to foreign sovereign states.

The case has been ably and exhaustively argued and I have

(1) (1830) 1 B. & Ad. 450.
(2) [1896] 2 Q. B. D. 455.
(3) (1865) 6 B. & S. 225.
(4) (1914) 31 T. L. R. 20.
(5) [1902] P. 42.
(6) (1879) 41 L. T. 655.
(7) (1869) 77 U. S. (10 Wall.) 15.
(8) (1884) 16 Federal Reporter 491.
(9) (1880) 44 L. T. 199.
(10) [1923] 1 Ch. 385, 398.
(11) (1876) 1 Ex. D. 285, 292.
(12) (1878) 9 Ch. D. 351.

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been referred to a great number of reported cases and textbooks. It will not, however, be necessary for me to embark on any comprehensive review of the authorities by which the principle of immunity is established, for, as I understand the arguments addressed to me, the general principle is not seriously in dispute, and the real contest centres on the application of the general principle to the facts of this particular case, having regard to the form of the present action, the nature and effect of the relief sought in it, and the circumstances in which such relief is sought.

The principle of immunity was thus stated by Brett L.J. in *The Parlement Belge* (1): " The principle to be deduced " from all these cases is that, as a consequence of the absolute " independence of every sovereign authority, and of the " international comity which induces every sovereign state " to respect the independence and dignity of every other " sovereign state, each and every one declines to exercise " by means of its courts any of its territorial jurisdiction " over the person of any sovereign or ambassador of any " other state, or over the public property of any state which " is destined to public use, or over the property of any " ambassador, though such sovereign, ambassador, or property " be within its territory, and, therefore, but for the common " agreement, subject to its jurisdiction."

It will be observed that this statement of the principle refers to " the property " of foreign sovereign states, but it has since been recognized that a like immunity is enjoyed by a foreign sovereign state in respect of property in its possession or under its control. This clearly appears from the speeches in the House of Lords in *Compania Naviera Vascongado* v. *S.S. Cristina* (2).

It is, however, to be noted that, where the principle of immunity is invoked in cases in which the foreign sovereign state is not itself sued, but which concern property in which the foreign sovereign state claims some proprietary or possessory interest, then, in the absence of a proved or admitted right of property in the foreign sovereign state, possession or control by it of the thing in suit is a condition essential to the application of the principle. A mere claim by a foreign sovereign state to property in the possession of a third party will not oust the jurisdiction of the municipal court over an action to recover the property brought by some other claimant against the third party. This clearly appears from the speech of Lord Maugham in the *Cristina* case (1), and from the judgment of the Court of Appeal delivered by the present Master of the Rolls in *Haile Selassie* v. *Cable & Wireless Ld.* (2).

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(1) 5 P. D. 197, 214.

(2) [1938] A. C. 485.

The cases appear to establish a further limitation on the principle of immunity to the effect that, if property in this country is subject to a trust, the court has jurisdiction to administer the trust at the suit of any person interested, even though the persons interested include a foreign sovereign state which does not submit to the jurisdiction of the court. See *Gladstone* v. *Musurus Bey* (3); *Larivière* v. *Morgan* (4). The latter decision was reversed in the House of Lords, but the correctness of the statement of the law it contains on this point was not questioned and seems to have been accepted as authoritative by Lord Maugham in the *Cristina* case (5).

With I think only two exceptions, namely, *Twycross* v. *Dreyfus* (6) and *Vavasseur* v. *Krupp* (7), all the cases cited to me in which the principle of immunity has been held to apply (other than cases involving the direct impleading of a foreign sovereign or person entitled to a similar immunity under the Diplomatic Privileges Act, 1708, by making him a party to the suit) have been Admiralty cases involving judgments in rem. A judgment in rem, of course, differs from an ordinary judgment in personam in the important respect that the latter is binding only as between the parties to the suit, while the former affects the status of the property in respect of which it is made and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. Thus a judgment in rem against property in which a foreign sovereign is interested, whether as owner or as having possession or control of it, must clearly have the effect of ousting the foreign sovereign's interest whether he is a party to the proceedings or not, and is therefore manifestly one which the municipal court has no jurisdiction to pronounce. On the other hand, assuming circumstances enabling relief in personam in respect of property in which a foreign sovereign is similarly interested

(1) [1938] A. C. 485, 516, 517.
(2) [1938] Ch. 839, 844.
(3) 1 H. & M. 495, 503.
(4) L. R. 7 Ch. 550; L. R. 7 H. L. 423.
(5) [1938] A. C. 485, 520.
(6) 5 Ch. D. 605.
(7) 9 Ch. D. 351.

to be claimed in proceedings constituted, without manifest deficiency of parties, against a defendant or defendants other than the foreign sovereign himself, any order made in the absence of the foreign sovereign would not be binding on him, but would leave him free if so minded to assert his interest thereafter. But I do not think it can be maintained that the principle of immunity is confined to cases where either a foreign sovereign is directly impleaded as a defendant or relief in rem is sought in his absence against property owned by him or in his possession or control.

I cannot regard any such limitation as warranted by the statements and discussions of the principle of immunity contained in the authorities ; indeed it would be inconsistent (for instance) with the statement of the principle by the Master of the Rolls in delivering the judgment of the Court of Appeal in *Haile Selassie* v. *Cable and Wireless Ld.* (1), and with much of what was said by Lord Maugham in his speech in the *Cristina* case (2) ; it would also, I think, be inconsistent with the two cases of *Twycross* v. *Dreyfus* (3) and *Vavasseur* v. *Krupp* (4), to which I have already referred, though it is true to say that in the former case the action was defective as regards parties in the absence of the foreign sovereign quite apart from the question of immunity ; it would moreover be inconsistent with the essential corollary to the principle of immunity that the municipal court will not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property owned by him, or of the possession or control of property in his possession or control, or else submitting to the jurisdiction of the court, as the following example will show.

Suppose a foreign sovereign brings to this country in his possession chattels seized by him in his own country by some act of expropriation, the validity of which is questioned by the person who owned them at the date of the seizure. Suppose further that the foreign sovereign deposits the chattels in this country for safe custody with an agent not in his own person entitled to diplomatic immunity and the claimant then sues the agent for an injunction restraining him from parting with the chattels otherwise than to the plaintiff and an order for their delivery up. If in these hypothetical circumstances the injunction and order for delivery up were granted against the agent, the foreign sovereign would not be bound, but the agent undoubtedly would be bound. The injunction would entitle and bind the agent to refuse to deliver the chattels to the foreign sovereign without an order of the court, and the foreign sovereign would therefore be compelled to elect between submitting to the jurisdiction of the court, by applying to have the injunction dissolved in order to regain the custody of the chattels and acquiescence in being permanently deprived of their custody. The order for delivery up, with which the agent would be bound to comply, would transfer the chattels from the custody of the agent holding them on the foreign sovereign's behalf to the possession of the claimant; and although it would leave the foreign sovereign free to assert his right to the chattels he would again be compelled to elect between submitting to the jurisdiction of the court as plaintiff in an action in which he would have to prove his title, and acquiescence in losing the chattels to the claimant.

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(1) [1938] Ch. 839.

(2) [1938] A. C. 485.

(3) 5 Ch. D. 605.

(4) 9 Ch. D. 351.

In *The Parlement Belge* (1), Brett L.J. said: "To implead "an independent sovereign in such a way is to call upon him "to sacrifice his property or his independence. To place him "in that position is a breach of the principle upon which "his immunity from jurisdiction rests." It is true that this observation was made in relation to an Admiralty action in rem, but I think it applies with equal force to an action in personam of the type postulated above.

Accordingly although in the present case no foreign sovereign is a party to the action, and the sole defendant is the Bank which is obviously not entitled in its own person to any immunity, and the relief sought in respect of the sixty-four gold bars is obviously relief in personam and not in rem, it is in my judgment nevertheless an action to which the principle of immunity may be applicable.

The principle being therefore in my view potentially applicable to the present action, its application or exclusion seems to me to turn on the answers to the following questions: "(i) For the purposes of the principle of immunity are the "sixty-four gold bars, notwithstanding their deposit with "the Bank, in the possession or control of the governments "of the United Kingdom, the United States of America "and the Republic of France? (ii) If so, is such joint possession "or control equivalent for the purposes of the principle of

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(1) 5 P. D. 197, 219.

" immunity to possession or control simply by the two foreign " sovereign states concerned or by one of them ? (iii) If so, " is such possession or control for public purposes ? " (It is not entirely clear on the authorities whether this element is still to be regarded as an essential condition of immunity, but I will assume so for the purposes of this case.) " (iv) If so, " would the relief claimed in the action, if granted, infringe " the principle of immunity ? "

To deal with these four questions in the above order: (i) I am clearly of opinion that the three governments were in possession or control of the sixty-four gold bars within the meaning of the principle of immunity.

Sir Andrew Clark for the company contended the contrary on (in effect) two main grounds.

First he contended that, the Bank being a bailee for reward of the gold, the only bailor in the case, the only other party to the contract of bailment, was the government of the United Kingdom acting by His Majesty's Treasury. I find myself unable to place this construction on the letter of March 9, 1948. It is true that this letter came from His Majesty's Treasury and that it requested the opening of the Gold set-aside Account " in the name of His Majesty's Treasury on account " of " the governments of the United States, the United Kingdom and France. But it is in my view abundantly plain from the remainder of the letter that the intention was not merely to open a Treasury account labelled for departmental convenience as being on account of the three governments, but to open an account for the three governments, whose representatives on the Tripartite Commission were to operate the account and were to be the depositors of the gold to be held in the account pending its eventual distribution as mentioned in the letter, which distribution was to be done on their instructions. I think the position may fairly be summarized by saying that in opening the account His Majesty's Treasury was acting as an intermediary on behalf of the three governments, and that the account when opened was to comprise gold jointly deposited by and to be held at the joint disposal of the three governments. It clearly appears from the evidence that this is the view of the position taken not only by the Bank but also by the three governments themselves. In particular a letter from His Majesty's Treasury dated October 21, 1948, which is in evidence, described the gold in question as " jointly held by His Majesty's Government

" in the United Kingdom and the Governments of the United " States and the French Republic," and I fail to see how I, for the purpose of investing myself with jurisdiction, can ascribe to His Majesty's Government a claim which it does not make to the effect that the gold is held solely by His Majesty's Government, to the exclusion of the other two Governments concerned. I am accordingly of opinion that this contention fails.

Sir Andrew Clark secondly contended that the legal implications of the Bank's position as bailee for reward of the gold are such as to exclude the three governments from possession or control of the gold even though the three governments are joint bailors of it (as I hold them to be), and even though the bailment is merely a bailment at will for safe custody and disposal as directed by the bailors, which is clearly the type of bailment in question here. The result of this contention, if well-founded, would be to reduce the status of the three governments for the present purpose to that of mere claimants of property in the possession of a third party (namely the Bank), and it would follow from *Haile Selassie* v. *Cable and Wireless Ld.* (1), that the mere claim of the three governments to the sixty-four gold bars, divorced as it would be according to this contention from possession or control, would not oust the jurisdiction of the court over an action brought by the plaintiff company against the Bank for the purpose of establishing its title to, and recovering, possession of the gold. In my view, however, this contention is ill-founded. I accept as applicable to the present case the statement of the law on this point contained in the judgment of the Court of Appeal delivered by Mellish L.J. in *Ancona* v. *Rogers* (2), from which I need only quote the following short passage: " It seems to us that goods which have been delivered to a " bailee to keep for the bailor, such as a gentleman's plate " delivered to his banker, or his furniture warehoused at " the pantechnicon, would in a popular sense as well as in " a legal sense, be said to be still in his possession, and we " see no valid ground for holding that they are not still in " his possession within the meaning of the Bills of Sale Act." It was suggested that this part of the judgment was merely obiter. I cannot so regard it. The question in the case was whether the goods comprised in an unregistered bill of sale were in the possession of the grantor of the bill at the date of her insolvency. It was argued that the goods in question were not then in her possession, because they were the subject of a bailment by her to one Horlock and therefore in the possession not of the bailor but of the bailee Horlock at the critical date. The court held on the facts that there was no bailment to Horlock and that the goods had remained in the actual possession of the insolvent. They then went on to consider what the position would be if they were wrong in supposing that the goods were not delivered to Horlock as bailee and on that hypothesis came to the conclusion appearing from the passage quoted above. This part of the judgment was therefore by no means merely obiter, since it stated an alternative ground for the decision. Some reliance was placed by Sir Andrew Clark on the later decision of the Exchequer Division in *Lincoln Waggon and Engine Company* v. *Mumford* (1), but I think this case turned on its own particular facts and especially on the circumstance that the goods there in question were pledged to the bailee as security for a loan; and if and so far as it conflicts with *Ancona* v. *Rogers* (2) I think I must clearly prefer the statement of the law contained in that case as a decision of the Court of Appeal. It was suggested that even if the statement of the law in *Ancona* v. *Rogers* (2) should be accepted as correct, it is limited in its application to cases in which the bailor is the owner of the goods delivered to the bailee, and therefore does not apply in the present case because the three governments had at most no more than bare possession or control of the gold, the owner of it being the plaintiff company. I think this argument (besides prejudging in favour of the plaintiff company the very matter in dispute in the action) involves a confusion between possession and title. Setting aside as without relevance here cases of palpably unlawful possession, as of stolen goods deposited by the thief with a receiver, I fail to see how the question whether goods remain in point of law in the possession of a bailor after he has delivered them to a bailee for safe custody can be made to depend on whether the title under which the bailor was in possession of them at the time of such delivery is or is not claimed by some third party to be invalid. It was further suggested that the Bank as a bailee for reward would have a lien on the gold for its charges, and that this in itself would suffice to prevent the gold once delivered to the Bank from remaining in point

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(1) [1938] Ch. 839.

(2) 1 Ex. D. 285, 292.

(1) 41 L. T. 655.

(2) 1 Ex. D. 285, 292.

of law in the possession of the three governments. It is not clear to me that in the absence of some special bargain (of which there is no evidence) the Bank would be entitled to any such lien, but in any case I do not think the mere possibility of such a lien being asserted in the event of the charges not being duly and punctually paid would suffice to exclude the three governments from legal possession. I therefore hold that the gold, notwithstanding its delivery to the Bank may (in the words of Mellish L.J. in *Ancona* v. *Rogers* (1)) "in a "popular as well as in a legal sense" be said to be still in the possession of the three governments. I hold further that accordingly the gold must be regarded as still in the possession of the three governments for the purposes of the doctrine of immunity. I see no ground for the view that the term "possession" when used in that connexion in the authorities is used in any specially narrow or restricted sense or to be understood as confined to actual physical possession. A foreign sovereign state (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign state were essential to immunity on the score of possession by such state, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign state (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions respecting the particular mode in which a foreign sovereign state might happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold was brought to this country by a foreign sovereign state to be applied in the purchase of goods for the public purposes of that state and placed in the hands of a servant of the state concerned to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign state, irrespective of any immunity from process the servant might be entitled to claim in his own person. If on the other hand gold brought to this country by a foreign sovereign state for similar purposes was deposited by it with a banker or other agent for safe custody and disposal in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection against actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think it would be right to make the application or exclusion of the principle of immunity (based as it is on substantial reasons of policy) turn upon nice distinctions of this kind. Moreover, I think the contention that " possession " for the purpose of the principle of immunity means actual physical possession is really impossible to reconcile with the decision of the House of Lords in *The Arantzazu Mendi* (1), where it was held that the vessel was in the possession of the Spanish Nationalist Government by virtue of a decree of General Franco requisitioning it for public services, coupled with declarations by the managing director of the owners and by the master of the vessel that they consented to the order of requisition and held the vessel at the disposal of the Nationalist Government. That seems to me clearly to involve the view that legal or constructive, as opposed to actual or physical, possession is possession for the purposes of the principle of immunity.

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(1) 1 Ex. D. 285, 292.

If I were wrong in my view that the three governments as bailors are in possession of the gold in the sense intended by the principle of immunity, I think it abundantly plain that they are in control of it within the meaning of the principle. I can imagine no better example of control than the case of property deposited with a bank for safe custody and disposal in accordance with the directions of the depositor. I see no justification for limiting " control " for this purpose to " control " ejusdem generis with the powers of direction and user conferred by the requisitioning of a vessel.

I should perhaps here mention three more or less subsidiary points taken by Sir Andrew Clark: he submitted (as I understood him) that the bailors were not the three governments but the respective representatives of the three governments on the Tripartite Commission. In my view there is no substance in this contention. I think the position clearly is that the bailors are the three governments acting for this purpose through their respective representatives on the Tripartite Commission.

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(1) [1939] A. C. 256.

He also submitted (as I understood him) that even if (contrary to his contention) the sixty-four gold bars were "monetary "gold" there was no power in the three governments or the Tripartite Commission under the agreement of January 14, 1946, and the orders by which the Commission was set up, to take possession of it, bring it to England and deposit it with the Bank. With that contention (whatever its effect, if well-founded, on the question of title) I am not now concerned, the question now before me, as I have already said, being simply and solely the question of jurisdiction.

Sir Andrew Clark also suggested (though I think somewhat faintly) that the sixty-four gold bars were impressed with trusts under which the plaintiff company was interested, and consequently that the case could be brought within the exception to the principle of immunity recognized (for instance) in *Gladstone* v. *Musurus Bey* (1) and *Lariviére* v. *Morgan* (2). I fail to discover any vestige of a trust in favour of the plaintiff company in this case. It seems to me to be simply a matter of competing claims, the rival claimants being the three governments on the one hand and the plaintiff company on the other hand, the claim of the three governments being coupled with possession. The fact that if the three governments are right in their claim they may be said to hold the sixty-four gold bars as trustees for the purposes of Part III of the agreement of January 14, 1946, is so far as I can see wholly without relevance for the present purpose.

Before passing from question (i) I should perhaps mention (in case I should be thought to have overlooked them) two American cases relied on by Sir Andrew Clark, namely, *The Davis* (3) and *Long* v. *The Tampico* (4). Of these two cases I need only say that they seem to have turned very much on their own special facts, but that if and so far as they can be regarded as inconsistent with the views expressed in this judgment I decline to follow them.

(ii) In my judgment the principle of immunity is not excluded by the fact that possession and control of the sixty-four gold bars is here vested in the two foreign governments concerned jointly with the government of the United Kingdom. Interference with the joint possession and control of the three

(1) 1 H. & M. 495.
(2) L. R. 7 H. L. 423.
(3) 77 U. S. (10 Wall.), 15.
(4) 16 Federal Reporter, 491.

governments would in my view necessarily be interference with the possession and control enjoyed by each of them jointly with the others. I fail to see how the court could arrogate to itself jurisdiction to interfere with the joint possession and control quoad the two of the three governments concerned, which are governments of foreign sovereign states, because the third is the government of the United Kingdom and capable of being sued in this country under the Crown Proceedings Act, 1947.

(iii) In my judgment the purposes for which the sixty-four gold bars are (rightly or wrongly) held by the three governments (namely, disposal in accordance with the provisions of Part III of the agreement of January 14, 1946) are manifestly and essentially public purposes within the meaning of the principle of immunity, and none the less so because they are public purposes not merely of the governments of the United Kingdom, the United States and France, but also of the other Allied Governments party to the agreement of January 14, 1946.

(iv) It follows from what I have already said that in view of the answers which should in my judgment be given to questions (i), (ii) and (iii) I hold that this court has no jurisdiction to entertain the plaintiff company's action so far as the claims for delivery up of the sixty-four gold bars and for relief by way of injunction are concerned.

It remains to consider the claims for damages. It was urged by Sir Andrew Clark that there was at all events jurisdiction to entertain these claims, and that the action should accordingly be allowed to proceed as an action for damages only. He included in this submission the claim for delivery up on the ground that the court could in the exercise of its discretion order payment by the Bank of the value of the sixty-four gold bars in lieu of an order for delivery up.

It should be noted that the claims for damages here (including the claim for payment of the value of the sixty-four gold bars in lieu of delivery up which the claim for delivery up by implication includes) are founded on the self-same cause of action as the claims for delivery up and relief by way of injunction, namely the alleged wrongful detention of the sixty-four gold bars. These claims for damages are therefore in no way comparable to a claim for damages for an independent wrong, such as the liability of private owners of a vessel for a collision taking place while the vessel is being operated under the orders of a foreign sovereign state for public purposes, (cf. *The Crimdon* (1)), or such as might arise on land in the case (for instance) of a garage proprietor who, being entrusted by a foreign sovereign with a motor car for safe custody, ran down a pedestrian while driving the motor car to his garage.

Nor can I regard this case as in any way comparable with one in which a bailee for a private individual is sued in detinue or trover by a third party and elects not to bring in his bailor by interpleader proceedings but to defend the action on the strength of, and stand or fall by, the title of his bailor. In such a case the question of title is a question arising between private individuals which the court has jurisdiction to try and the bailor is not bound simply because he is not a party to the suit, and not because the court has no jurisdiction to bind him. There is no reason, in point of jurisdiction, in such a case why the bailor should not be brought before the court or left to make his own application to the court if so minded.

Here, the Bank cannot interplead because two of its three joint bailors are not amenable to the jurisdiction of the court, and the question of title as between the three governments and the plaintiff company is one which the court has no jurisdiction to try.

The Bank's possession of the sixty-four gold bars cannot in my view be distinguished from the three governments' possession of them. The Bank is in possession simply in right of the three governments and has no independent interest or title whatsoever. It is moreover estopped as between itself as bailee and the three governments as bailors from denying the three governments' title. In sum, the Bank must stand or fall simply by the title of the three governments.

Therefore this court cannot hold the Bank to be wrongfully in possession without also holding the three governments to be wrongfully in possession, and it is only on the footing that the Bank is wrongfully in possession that any relief whether by way of damages or otherwise can be awarded against the Bank.

Moreover an order for delivery up of the gold to the plaintiff company would I think clearly have the effect of determining the bailment, putting an end to the estoppel subsisting between the Bank and the three governments and leaving the Bank free to set up the title of the plaintiff company in any proceedings brought against it by the three governments as equivalent to an eviction by title paramount. See *Biddle* v. *Bond* (1). I think an award of damages against the Bank, involving as it necessarily would a decision of the court that the title of the plaintiff company was paramount to that of the three governments, would have the like effect. Further, if the Bank was ordered to pay and paid to the plaintiff company damages representing the value of the gold, the title of the plaintiff company to the gold would pass to the Bank, and the Bank could in its own right set up that title against the three governments. I cannot therefore accept the proposition that damages could be awarded against the Bank without any interference with the possession or control of the sixty-four gold bars by the three governments.

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(1) 35 T. L. R. 81.

I should add that I find difficulty in appreciating how the court could have jurisdiction to order the Bank to pay damages (in effect) for failing to do that which the court has no jurisdiction to order it to do, namely to deliver up the sixty-four gold bars to the plaintiff company.

These considerations seem to me to point strongly to the conclusion that for the present purpose no distinction should be made between the claims for delivery up and relief by way of injunction and the claims for damages.

But I think the objection in point of jurisdiction to the claims for damages can be put on wider grounds. The principle of immunity precludes the court from exercising jurisdiction over any property of or in the possession or control of a foreign sovereign state. I think that necessarily means that so long as property is in the possession or control of a foreign sovereign state this court can entertain no proceedings which if successful would result in an interference with the foreign sovereign state's exercise of such possession or control whether directly (as by removing the property from the custody of an agent to whom the foreign sovereign state has entrusted it) or indirectly (as by casting in damages for wrongful possession an agent through whom the foreign sovereign state is exercising its possession or control). I think it would be a wholly unwarrantable restriction on the principle of immunity to hold that a foreign sovereign state in possession or control of property in this country cannot entrust such property to an agent for safe custody without exposing the agent to the risk of being sued by third parties for wrongful possession,

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(1) 6 B. & S. 225.

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or that an action against the agent for wrongful possession involves no interference with the possession or control of the foreign sovereign state if the court, while holding the possession of the agent, and therefore that of the foreign sovereign state, to be wrongful possession, declines for want of jurisdiction to order delivery up of the property, but in lieu thereof awards damages against the agent as the price (in effect) of his continuing in possession of the property on the foreign sovereign state's behalf—a price which as between the foreign sovereign state and the agent must ultimately fall on the foreign sovereign state itself.

Looking at the substance of the whole matter, I think this action can fairly be described as in effect an attempt to sue indirectly the three governments concerned, of which two, namely the governments of the United States and France, as governments of foreign sovereign states, cannot be directly sued in this court, and I think it would be what James L.J. in *Twycross* v. *Dreyfus* (1) termed " a monstrous usurpation " of jurisdiction " to allow such an action to proceed.

For all these reasons I am of opinion that the motion by the Bank in this case should succeed, and I will make an order accordingly. There will be an order that all further proceedings in the action, including the second motion, be stayed ; and that the plaintiffs do pay to the defendants their costs of the two motions and of the action.

Order accordingly.

Solicitors : *Slaughter & May ; Freshfields ; Treasury Solicitor.*

J. L. D.

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(1) 5 Ch. D. 605, 618.

HARMA
J.

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Feb. 10.

In re BORTHWICK, DECD.

BORTHWICK AND ANOTHER *v.* BEAUVAIS AND OTHERS.

Family provision—Maintenance—Substantial estate left by testator—Wife deserted by testator—Small provision for wife and daughter under his will—Amount of maintenance—Inheritance (Family Provision) Act, 1938 (1 & 2 *Geo.* 6, *c.* 45) *s.* 1, *sub-ss.* 1, 6, 7.

HARMAN J.

1949

BORTHWICK, DECD., *In re.* BORTHWICK *v.* BEAUVAIS.

The testator by his will left to his wife, the first plaintiff, 250*l.* a year and 1,000*l.* in trust for their youngest daughter, the second plaintiff. The testator married the first plaintiff in 1909, when he was earning a small weekly wage as a hairdresser's assistant. He embarked on various business ventures and in 1925 became bankrupt. He deserted his wife and children in 1926 and never returned to them. Thenceforward he allowed his wife 2*l.* a week which he increased to 3*l.* a week. The evidence established that the first plaintiff had always behaved as a dutiful wife and had helped him in his business, but that the testator had left her to live with another woman. Between 1926 and 1939 he made a considerable fortune, of the extent of which the first plaintiff had never been aware. The plaintiffs applied under s. 1, sub-s. 1, of the Inheritance (Family Provision) Act, 1938, for reasonable provision for their maintenance. The net estate for the purposes of the Act was 130,000*l.*, and the maximum aggregate amount that could be awarded to the plaintiffs under the Act was 2,400*l.* a year.

Held, that the question of what amounted to reasonable provision for maintenance of dependants turned to some extent on the circumstances and accustomed style of living of the widow, but also on the circumstances of the testator, that was to say whether he died a rich man or a poor man. In the present case, the first plaintiff should receive an increase over and above her testamentary annuity so as to bring her income up 1,000*l.* a year during widowhood: the second plaintiff should receive 100*l.* a year while she remained a spinster, during the first plaintiff's widowhood. On the first plaintiff's remarriage or death the second plaintiff, if still a spinster, was free to apply to the court again.

The annual sums awarded were to be free of legacy duty but subject to tax, and to run from the death of the testator.

ADJOURNED SUMMONS.

The testator, William Borthwick, married the first plaintiff Margaret Borthwick, in 1909, when they were both twenty-one years of age. There were four children of the marriage, of whom the second plaintiff, Margaret Borthwick, a spinster born in 1926 was the youngest, and the only dependant (apart from her mother) for the purpose of the Inheritance (Family Provision) Act, 1938. At the time of the marriage the testator was a hairdresser's assistant earning a small weekly wage. He embarked on different business ventures with varying success. In October, 1925, he became bankrupt, in consequence of which he lost the home in which he had been living with his wife and children. About January, 1926, he took them to live with his parents and told his wife that he would live in lodgings until he could make a new home. The testator in fact never returned to his wife: he made her an allowance of 2*l*. a week, which he increased to 2*l*. 10*s*. 0*d*. a week after the birth of the second plaintiff. In 1932 he increased it to 3*l*. a week, at which sum it remained until his death. Apart from a few miscellaneous gifts that was the only provision he made for his family during the remainder of his life. After he left his wife and children the testator lived with another woman as his wife, and this association continued until shortly before his death in 1946. Some time between 1926 and 1939 the testator acquired considerable wealth. He established himself at a place at Hatfield called the "Old Rectory," which was valued for probate at 18,000*l*., and lived in a comparatively substantial manner. The wife, according to her evidence, became aware that his circumstances had to some extent improved, but not to what extent.

By his last will dated April 21, 1944, the testator appointed two accountants a Mr. Beauvais and a Mr. Attwell and his solicitor Mr. Atkey to be his executors. He bequeathed an annuity of 250*l*. to his wife and 1,000*l*. in trust for his youngest daughter, the second plaintiff, and her issue. He gave a legacy to the woman who had lived with him as his wife. He bequeathed 2,000 shares in a private company to each of his executors. These shares were of considerable value and constituted the main asset of his estate. He also gave his executors an option to purchase up to one-half of the remainder of his ordinary shares in the same company, at a price considerably below their probate value, and to spread payment therefor over a number of years. That option had been exercised. He made various other bequests, and subject thereto he gave the net residue of his estate to charities to be selected by his trustees. His net estate for the purpose of the Inheritance (Family Provision) Act, 1938, was about 130,000*l*. The testator sought to justify the treatment of his wife in a statement purporting to be made for the purposes of s. 1, sub-s. 7, of the Act. This document was contemporaneous with a previous will made by the testator in 1939, and was re-signed by him in 1940 and 1942 when he made further wills, and again on April 21, 1944, when he made his last will. He stated in this document that his wife had always been extravagant, that their marriage had been unhappy, that she had failed in her duties as a wife and that when he went bankrupt she told him "to clear out." The wife's evidence, which was corroborated by that of the husband's own relatives, was that she had not only shown care and devotion for the welfare of the testator and their children, but also helped him in his business.

The plaintiffs asked that reasonable provision should be made for their maintenance under s. 1, sub-s. 1, of the Inheritance (Family Provision) Act, 1938.

Pascoe Hayward K.C. and *H. Lightman* for the plaintiffs. If regard be had to the size of this estate and the extremely small annuity left to the widow, it is submitted that the widow is in any event entitled to an order under the Act. This would be so even if the evidence in the document signed by the testator were true; but it is submitted that this document was fraudulent, or was made at a time when the husband had persuaded himself that the allegations in it were true. In the document the testator is, in effect, saying that it is only the truth of the allegations therein contained that would justify him in making such a small provision for his wife. But in fact the evidence is all the other way. The wife's evidence (which is supported by that of the husband's own relatives) is that she was at all times a dutiful wife and mother, and that it was the testator who left her. Although the court must take into account the standard of living to which the wife has been accustomed, it must also consider other factors. One of these factors is that the testator died a rich man, leaving his wife, through no fault of her own, ill-provided for. It is clear from sub-s. 6 of s. 1 of the Act that the jurisdiction of the court is not confined to making an order according to the wife's existing standard of living. It is submitted that this is a case for directing payment of the maximum annual amount permissible under the Act.

A. C. Nesbitt, for the defendant executors, took no part in the argument on the merits.

G. M. Parbury, for other defendants interested under the will, supported the application, and adopted the argument addressed to the court on behalf of the plaintiffs.

G. Cross for the Attorney-General, interested in the bequest for charitable purposes. The court has no power under sub-s. 1 of s. 1 to vary a will because the testator has acted unfairly. The jurisdiction only arises if the court is satisfied that the will does not make reasonable provision for the maintenance of a dependant. The key word of the sub-section is maintenance. Since the widow had been accustomed to live on 3*l*. a week for nearly twenty years, it cannot be said that an annuity of 250*l.*, which is considerably more, is unreasonable. An increase above the amount provided by the will cannot be justified merely on the ground that the testator acted badly. The size of the estate is irrelevant in this case because the standard of living to which the widow was accustomed bore no relation to it. He referred to *In re Styler* (1) and *In re Inns* (2).

HARMAN J. It is agreed now before me, after considerable controversy, that the maximum which I could provide, having regard to the terms of the Act, for the dependants of the testator, who are, in effect, the plaintiffs, would be 2,400*l.* a year as against the sum which they get which is about 280*l.* a year. There is a large discrepancy between what they get, and what it is within my jurisdiction to give them. The testator, who was living in affluence, kept his wife in penury. She does not appear to have made any protest, she does not appear to have had anything like full knowledge of how things were with him, and she does not seem to have been conscious altogether of what his obligations were. She was living, of course, on a very different scale from what she would have been living if she had been in her rightful place in his home. It is not suggested that she was guilty of bad conduct which would have justified him in excluding her from his home or separating from her, still less divorcing her.

It is quite obvious that he and his advisers were conscious that what he was doing looked a shabby enough act and were anxious enough to justify it, for what motive one can very well see. The means he takes to justify it are to promulgate this statement, the tenor of which is first that she was, in the early part of their life, extravagant and did not keep within the amount he gave to her to pay the housekeeping bills; secondly, that he was not happy with her because she did not fulfil many of the domestic duties which he expected of a wife. I have not the least idea what that means, but let it pass for the moment. He then says thirdly that when he lost his money—in other words, when he became bankrupt on his own petition—she told him to clear out. One cannot but ask oneself from what she could have told him to clear out. The uncontradicted evidence is that she and her children were given asylum at his parents' house. At any rate, that is the excuse he gives for having left her, that she told him to clear out. He says he honestly believes certain things happened through no fault of his own. Any man who wishes to act honestly does not say he honestly believes a thing, he either says he believes it or he does not. To say "I honestly "believe," at once raises a suspicion that the man is not honest about it. I think this document is a thoroughly dishonest document. Whether in 1939, when he first penned it, he was persuaded, either by himself or his advisers or those who expected to make money out of him, that there was something in these ridiculous charges, I do not know. They are refuted not only by the wife, but by the testator's own brother and sister, who both came forward here to give evidence that she was a good wife to him. In the evidence here I can see no room for any suggestion that there was any fault on the part of the wife. Still I am not here to punish the husband.

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(1) [1942] Ch. 387. (2) [1947] Ch. 576.

It is said on behalf of the Crown, who are here as protectors of the charities who take residue, that I must take the case as I find it, neither colouring my judgment in the lady's favour through indignation with the shabby behaviour of the husband, nor going behind his judgment in the matter by finding what she would have been entitled to if she had had her rights. It is said, quite truly, that if she had lived as his wife at the Old Rectory at Hatfield, 250*l.* a year would not have been adequate provision for her. But, says the objector, that is not the fact: she did manage to live for 20 years or so on this miserable pittance of 3*l.* a week. She never complained about it, and therefore 250*l.* a year, which is more than that, is a reasonable provision for the testator to have made by his will. In other words it is said the worse a man treats his wife in his lifetime the less he need leave her when he is dead.

I cannot accept such a cynical conclusion. By s. 1, sub-s. 1 (1) of the Act, as has been pointed out, the court has no jurisdiction at all unless it is of opinion that the will does not make reasonable provision for the maintenance of a dependant. It is said that maintenance is the only thing you can look at. What does that mean ? It does not mean that you can only give the dependant just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only mere subsistence.

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(1) The Inheritance (Family Provision) Act, 1938, s. 1, sub-s. 1: "Where after the commencement "of this Act, a person dies "domiciled in England leaving "(*a*) a wife or husband; (*b*) a "daughter who has not been "married . . . . and leaving a "will, then, if the court on "application by . . . . such wife "husband, daughter . . . . as "aforesaid (in this Act referred "to as a 'dependant' of the "testator) is of opinion that the "will does not make reasonable "provision for the maintenance "of that dependant, the court "may order that such reasonable "provision as the court thinks "fit shall, subject to such con- "ditions or restrictions, if any, as "the court may impose, be made

When one looks at sub-s. 6 of s. 1, it is seen that one of the matters to which the court is directed to pay attention is the "conduct of that dependant in relation to the testator and "otherwise." I cannot think that the conduct of the dependant towards the testator or otherwise can make the difference between whether you leave her starving in the gutter or no. The courts have not taken that view. It must therefore mean that an extravagant or an erring wife may be

"out of the testator's net estate "for the maintenance of that "dependant."

Section 1, sub-s. 6: "The "court shall, on any application "made under this Act, have "regard . . . . to the conduct of "that dependant in relation to "the testator and otherwise, and "to any other matter or thing "which in the circumstances of "the case the court may consider "relevant or material in relation "to that dependant . . . ."

Sub-s. 7: "The court shall "also, on any such application, "have regard to the testator's "reasons, so far as ascertainable, "for making the dispositions made "by his will, or for not making "any provision or further provision, as the case may be, for "a dependant, and the court "may accept such evidence of "those reasons as it considers "sufficient, including any statement in writing signed by the "testator and dated so, however, "that in estimating the weight, if "any, to be attached to any "such statement the court shall "have regard to all the circumstances from which any inference "can reasonably be drawn as "to the accuracy or otherwise of "the statement."

given less than one against whom nothing can be said. I am also directed by sub-s. 7 of s. 1 to have regard to any statement in writing signed by the testator. The most I could do about such a statement as there is in this case is to say that in my view it is worth nothing at all. Mr. Hayward says you can use it the other way about, you can use it as evidence against the testator: but for the malice actuating that statement he would have made a better provision for her and, indeed, he realized that the provision he was making was not, without some excuse, a reasonable provision. So far I can go. It seems to me, qui s'excuse s'accuse must be true of such a statement as that, and if a man says: "It is true the provision "I have made for my wife does seem too little, but wait until "you have heard what I have got to say and you will see "why it is"—I do not believe it. If, however, I disbelieve it I am left with this, that the testator acknowledges (if there is nothing in what he says), that he would have made some further provision. If this lady had been used to living at the Old Rectory, Hatfield, and that had been the circumstance of her life for the last twenty years, it may well be that 2,400*l.* a year would not have been too much to give her. But I do not think it would really help a lady in her position to have so much as that. She has not been used to anything on that scale. I think the circumstances in which she has been living are matters to take into account as well as the means of the testator to provide for her. I am not punishing the testator in what I propose to order. I am not saying that I approve of his actions during his lifetime. I am saying what I think a man in his position ought reasonably to have provided for his wife from whom he had parted through no particular fault of hers, and who was living in straitened circumstances. I think the lady is entitled, having regard to the ample means of the husband, to a generous scale of living, having regard to the kind of needs that she may reasonably be supposed to have, and I propose to increase her income during her widowhood, subject to tax, from the present sum of 250*l.* to 1,000*l.* a year, subject to tax.

That leaves the question of the second plaintiff. She is a young lady living with her mother and following some employment from which she earns a modest salary of 2*l.* 10*s.* 0*d.* a week, which one may suppose will increase to a certain extent. Having regard to the means I propose to give her mother, she will not be in any physical need—at any

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rate, if, as I imagine, her mother continues to live with her in amity. Nevertheless, the daughter is, as it seems to me, reasonably entitled to something. The testator should have made more provision for his daughter too. I propose that while her mother is alive and she herself remains a spinster, she shall receive 100*l*. a year. On her mother's re-marriage or death, she still being a spinster, she is to be at liberty to apply for further provision to be made for her. It is impossible at this stage to tell what may be the conditions prevailing by that time.

His Lordship also directed that both the annuities should be paid free of legacy duty and should run as from the date of death.

Solicitors: *Steavenson & Couldwell, agents for Gosschalk & Austin, Hull; Atkey & Son; The Treasury Solicitor.*

I. G. R. M.

Affirmed. C.A. [1949] 2 All E.R. 1070.

Affirmed. [1940] 1 Ch. 118

NEW ROCK COLLIERY CO. LD. *v.* MINISTRY OF FUEL AND POWER.

VAISEY J.

1949

Feb. 23.

Coal—Nationalization—Computation of interim income—Colliery company making up quarterly accounts—"Last complete accounting "period"—Coal Industry Nationalization Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 22, *sub-s.* 3 (*c*).

By s. 19 of the Coal Industry Nationalization Act, 1946, interim income became payable to nationalized colliery companies in respect of the period between the primary vesting date and the date on which compensation was fully satisfied for the transfer of their interests to the National Coal Board. By s. 22, sub-s. 3(*c*) of the Act that income may be computed as the amount of a company's profits attributable to its activities "for its last "complete accounting period before the first day of July in the "year 1946 . . . ."

The plaintiffs were a colliery company entitled to interim income under s. 19. It was the custom of this company to make up its accounts quarterly for the periods ending March 31, June 30, September 30 and December 31. Each quarterly account was audited and entered in the company's ledger. The accounts presented at the annual general meeting were the four quarterly accounts combined into one account. The two directors were the only shareholders.

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New Rock Colliery Co. Ld. v. Ministry of Fuel and Power.

Held, that the last complete accounting period for the purpose of s. 22, sub-s. 3 (*c*) was the three months' period ending June 30, 1946. *Jenkins Productions Ld.* v. *Inland Revenue Commissioners* (1944) 170 L. T. 292 distinguished.

ADJOURNED SUMMONS.

The plaintiffs were a colliery company entitled to interim income under s. 19 of the Coal Industry Nationalization Act, 1946, for the period between the primary vesting date and the date on which compensation was fully satisfied for the transfer of its interests to the National Coal Board. By s. 22, sub-s. 3 (*c*) (1), of the Act interim income is the amount of the company's profits and gains attributable to its activities either (as the company may elect) for its last complete accounting period before July 1, 1946, or the average of such amounts for its last two complete accounting periods before July 1 in the years 1944 and 1945 respectively. The plaintiff company elected to have the computation of interim income made on the former principle.

The company was a small private company incorporated in 1925, of which the two directors were the only shareholders. The company had always since its incorporation made up and produced quarterly accounts for the periods ending on March 31, June 30, September 30 and December 31. In the preparation of each quarterly account the company made an inventory and valuation of stock at the accounting date and brought the valuation into account. Each quarterly account was audited as soon as possible after the end of the quarter, and written up in the company's private ledger. Royalties payable for the half-years ending June 30 and December 31 were estimated for the quarters ending March 31 and September 30. For the purpose of computing the company's income tax liability the relevant amounts in the four quarterly accounts preceding September 30 were added together. At the company's annual general meeting the only accounts presented to the shareholders were the four quarterly accounts combined into one account.

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(1) The Coal Industry Nationalization Act, 1946, s. 22, sub-s. 3: "The following provisions of this "subsection shall have effect as "to the making to colliery con-"cerns . . . . of payments in "respect of each of the two years "beginning with the primary "vesting date and the first anni-"versary thereof respectively, "that is to say,—(*a*) a colliery "concern . . . . shall be entitled "in respect of each of the said "two years to a payment of an "amount equal to one-half of the "comparable ascertained revenue "of the concern . . . . attributable "to activities thereof for which "the transferred interests thereof "were used or owned; . . . .

"(*c*) for the purposes of para-"graph (*a*) of this subsection a "concern's . . . . comparable as-"certained revenue attributable "to activities mentioned in that "paragraph shall be taken to be "either (as the concern . . . . "may elect . . . .) the amount of "its profits and gains so attribut-"able, computed on income tax "principles subject to such "adaptations as may be pre-"scribed, for its last complete "accounting period before the "first day of July in the year "nineteen hundred and forty-six, "or the average of the amounts "of its profits and gains so "attributable and computed for "its two complete accounting "periods last before the first day "of July in the years nineteen "hundred and forty-four and "nineteen hundred and forty-five "respectively (any such amount "for any accounting period of "more or less than twelve months "being adjusted to a twelve "months' equivalent thereof)."

The question asked by the summons was whether on the true construction of s. 22, sub-s. 3 (*c*), of the Act " the last complete " accounting period before the first day of July, nineteen " hundred and forty-six " was : (*a*) the three months' period which ended on June 30, 1946 ; or (*b*) the twelve months' period which ended on June 30, 1946 ; or (*c*) the twelve months' period which ended on September 30, 1945. If alternative (*a*) were held to be the last complete accounting period, the annual profits would amount to approximately 21,000*l.*, the profits for the three months ending June 30, 1946, being 5,382*l.* If alternative (*b*) or (*c*) were taken as the last complete accounting period, the annual profits would be either 13,492*l.* or 2,278*l.* respectively. The argument proceeded on the footing that the choice lay between period (*a*) or (*c*).

W. M. Hunt for the plaintiff company. The company have always kept quarterly accounts for the periods ending March 31, June 30, September 30 and December 31. Their accounts for the purposes of income tax and the company's annual general meeting were a combination of four such accounts. Accordingly the accounting period of the company is a period of three months, and the last complete accounting period for the purpose of s. 22, sub-s. 3 (*c*) of the Act is the three months' period ending June 30, 1946. The last words of the sub-section envisage that the accounting period may be less than a year.

D. H. McMullen (*H. O. Danckwerts* with him) for the

Ministry of Fuel and Power. Although the plaintiffs did their accounts quarterly, it is submitted that the last complete accounting period was the twelve months' period ending September 30, 1945. The circumstances in *Jenkins Productions Ld.* v. *Inland Revenue Commissioners* (1) were similar to the present case. There the company made up their accounts half yearly, the accounts submitted to the annual general meeting were the two half-yearly accounts combined into one account. The Court of Appeal held that the annual accounts were properly described as the accounts of the business, notwithstanding that certain interim accounts were available. Similarly the fact that the plaintiff company also did quarterly accounts does not prevent the annual accounts from being the true accounting period. Therefore the last complete accounting period for the purpose of s. 22, sub-s. 3 (*c*), is the twelve months' period ending September 30, 1945.

Hunt in reply. *Jenkins Productions Ld.* v. *Inland Revenue Commissioners* (1) is distinguishable. The language used by the Act applicable in that case was different from the language of the present section, and did not contemplate an accounting period of less than one year, as s. 22, sub-s. 3 (*c*), does.

VAISEY J. stated the facts and continued: In those circumstances, Mr. Hunt for the plaintiff company asks me to decide that the three months' period ending June 30, 1946, constitutes the last complete accounting period for the purposes of the sub-section. On the other hand, Mr. McMullen for the defendant, the Ministry of Fuel and Power, says that the last complete accounting period was the twelve monthly period ending on September 30, 1945, that being the combined account which was laid before the shareholders at the annual general meeting. This company was a private company in the fullest sense of that expression, that is to say, there were only two shareholders, both of whom were directors. The formality of a general meeting was, no doubt, a formality in the extreme. There was no real difference between those to whom the quarterly accounts were presented and those to whom the annual accounts were presented. The difference between the method of accounting and the method of presenting the accounts was a distinction rather than a substantial difference.

(1) (1944) 170 L. T. 292, 293, 294.

I have been referred to the case of *Jenkins Productions, Ld.* v. *Inland Revenue Commissioners* (1) where a somewhat similar question arose under other statutory provisions. In that case the company kept not quarterly accounts but half-yearly accounts, and those two half-yearly accounts were apparently combined and submitted to the shareholders in the annual account. On the facts of that case Macnaghten J. upheld the contention of the company by deciding that the six-monthly period was the appropriate accounting period. That decision was reversed by the Court of Appeal, and it was held " that the " twelve-monthly account was truly made up notwithstanding " there were available the interim six-monthly accounts " for the auditors. The twelve-monthly account was submitted to the shareholders and was therefore a final account, " which the six-monthly accounts were not."

The Master of the Rolls, giving a judgment with which the other members of the Court of Appeal agreed, said this: " Having regard to the fact that the twelve-monthly account " in this case is nothing but a compilation from the six-monthly " accounts, it is contended you cannot say that that twelve-monthly account is made up at all. In my opinion, that " is an argument which will not bear examination. It seems " to me that the twelve-monthly account is truly made up, " notwithstanding that, there being available certain interim " accounts, the auditors, in order to produce the twelve-monthly account, did not have to re-examine the books: " the material was there all ready to hand and they used it." Then later in his judgment he said this: " Here you have a " company which in fact did prepare two different sets of " accounts: one a six-monthly account prepared for the " convenience of the directors; the other a twelve-monthly " account prepared for the information of the shareholders. " That twelve-monthly account is one which has certain " characteristics. First of all, it is to be submitted to the " shareholders, who are entitled to approve or disapprove it. " Therefore, in that sense, it is a final account in a way in " which the accounts produced to the directors for the six " months were not final accounts at all. Secondly, the accounts " so submitted to the shareholders were submitted in pursuance " of the statutory obligation to submit accounts. It seems " to me, bearing these two considerations in mind, that the " yearly accounts are primarily the more important of the two

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(1) 170 L. T. 292, 293, 294.

"sets of accounts which this company in fact got out. "Applying the language of this section to that state of affairs, "which of these two sets of accounts is properly to be described "as 'the accounts of the trade or business'?" That was quoting the words of the Act in question. "Surely there "can be only one answer to that question. The accounts "are the important final accounts. It seems to me that these "words have to be construed in the light of the well-known "practice of companies to have a financial period. A "company's financial period is commonly twelve months; "and accounts are got out in reference to that financial period. "When the paragraph speaks of the accounts being 'made up,' "it surely must mean the accounts which are the accounts "for the purposes of the company's financial unit of time"; and for those reasons the appeal from Macnaghten J. was allowed.

In this case the words of the Act are somewhat different. The reference is to "the last complete accounting period," and there is in the concluding words which I have quoted a distinct indication in the terms of the Act itself that the accounting period may be more or less than twelve months, provision being made for a necessary adjustment to a twelve months' equivalent. I have come to the conclusion that those final words make all the difference. Although I am anxious not to say anything which conflicts in any way with *Jenkins Productions Ld.* v. *The Inland Revenue Commissioners*(1) it seems to me that we have here an indication that the accounting period, whatever that means, whether it be twelve months or something else, is the relevant one in such a case as the present. It cannot be disputed on the evidence that the company made up its accounts quarterly. There is no evidence that the combined account was anything but the most formal combination of the four preceding quarterly accounts. Although it seems to make a great deal of difference in this case, it might, of course, have operated the other way. In any case, this company with no ulterior object in view but merely as a matter of legitimate arrangement of its own private affairs, has for years made up its accounts, had them audited, and had them entered in its ledger on a quarterly basis.

Although I have hesitated over this case, because it is obviously a case in which anybody might take the other view,

(1) 170 L. T. 292.

on the particular facts of this case I think the last complete accounting period before July 1, 1946, was the three months' period which ended on June 30, 1946, and I so certify.

Declaration accordingly.

Solicitors: *Church, Adams & Tatham, agents for Burges, Salmon & Co., Bristol; Treasury Solicitor.*

I. G. R. M.

SEBEL PRODUCTS LD. *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

VAISEY J.
1949
Mar. 9, 16.

Revenue—Voluntary payment of purchase tax—Tax held not to be leviable—Claim for repayment—Conditions of payment and acceptance—Money paid under mistake of law—Right of Crown to raise that defence—Crown Proceedings Act, 1947 (10 & 11 *Geo.* 6, *c.* 44), *s.* 21.

An action relating to the plaintiffs' liability to pay purchase tax in respect of a certain article of their manufacture was set down for trial on May 6, 1948. On May 11, 1948, the plaintiffs paid the defendants, the Commissioners of Customs and Excise, the amount of tax which would have been due if the plaintiffs' claim had failed. The action was heard on July 2, 1948, and determined in favour of the plaintiffs, who were given liberty to apply for an account of purchase tax already paid by them. The plaintiffs by this summons asked, under the liberty to apply, for an account of the tax thus paid and for repayment of the amount found due. The defendants contended that the tax was irrecoverable as being money paid under a mistake of law:

Held that, although there was no express agreement to refund the sum so paid in respect of purchase tax, an agreement so to do would be implied, since it must be inferred on the facts that the plaintiffs paid the money and the defendants received it on the footing that the plaintiffs should be entitled to recover it if the action were determined in their favour. The plaintiffs were accordingly entitled to the relief asked by the summons.

Per curiam:—By the Crown Proceedings Act, 1947, the defendants were placed in the same position as ordinary subjects, and there was no reason why in appropriate cases they should not refuse to refund money paid voluntarily under a mistake of law. This was a defence however which they should exercise with great discretion by reason of the position they occupied.

Application by summons, pursuant to liberty in that behalf previously granted.

The plaintiffs, Sebel Products Ld., in an action brought by them against the defendants claimed a declaration that one of the products of their manufacture known as the "Mobo "Rocker Swing" was not liable to purchase tax on the ground that it was a "swing" within the meaning of the exempting provision of the Finance Act, 1947. The defendants disputed the claim and contended that the tax was leviable. The writ was issued and the statement of claim delivered on February 27, 1948. The defence was delivered on March 31, 1948, and on May 6, 1948, the action was set down for trial. On May 11, 1948, the plaintiffs paid to the defendants the amount of purchase tax which would have been owing if the plaintiffs' claim in the action had failed. The action was heard and decided by Vaisey J. on July 2, 1948. By an order of that date his Lordship made a declaration in favour of the plaintiffs, and granted them liberty to apply for an account of the purchase tax already paid by them. The plaintiffs by this summons, dated November 12, 1948, asked, under that liberty to apply, for an account of the purchase tax which they had paid and for which they were not liable, and for repayment of the amount found due. The defendants resisted this claim on the ground that the money had been paid under a mistake of law and was accordingly irrecoverable.

The chairman of the plaintiffs' board of directors deposed in an affidavit that the money was paid after the action was set down for trial on the clear understanding that it would be refunded or accounted for by defendants if the action were decided in the plaintiffs' favour. He believed moreover that the defendants' representative, one Barnett, shared this view and was authorized or entitled to agree to such an arrangement so as to bind the defendants. Mr. Barnett was a solicitor on the staff of the solicitor to the defendants. He swore an affidavit disclaiming any such understanding, and denying that so far as he was concerned any agreement for repayment of the money was ever made.

Heald K.C. and *J. P. Graham* for the plaintiffs. The plaintiffs are entitled to an account of the purchase tax which they paid on articles which were in fact tax free. The evidence is that the money was paid on the clear understanding that it would be refunded if the action were decided in the plaintiffs' favour. Even if there were no such understanding, it would be against the conscience of the defendants to retain it.

The court has said that its officer should not retain money paid in such circumstances: see *In re Tyler* (1). That case was concerned with an officer of the court, here we are concerned with the Crown itself, which is the very fountain of justice: see Halsbury's Laws of England, 2nd ed., vol. 6, p. 414. The Crown's own court cannot render any lesser standard of justice than it requires of its officer. The case of *Wm. Whiteley Ld.* v. *The King* (2), is distinguishable. No action had been instituted when the money was paid in that case. Here the tax was paid not only after the writ was issued, but five days after the action was set down for trial.

H. L. Parker for the defendants. The sum paid in respect of purchase tax is not recoverable. It was a voluntary payment, made under a mistake of law. Whether tax paid in error is recoverable must depend on the particular facts of the case. Here the payment was voluntary and there was no agreement to repay or account for the money. Voluntary payments made before the issue of the writ would not, apart from any agreement to refund the money, be recoverable, even if they were made under protest or threat of proceedings: see *National Pari-Mutuel Association Ld.* v. *The King* (3) and *Wm. Whiteley Ld.* v. *The King* (2). This proposition is made on the assumption that the payments were made under a mistake of law, the position is different where payment is made under a mistake of fact. After the issue of the writ, circumstances may be different. But in fact the payment is even more of a voluntary nature as there can be no threat of proceedings for recovery. The fact that it might be unconscionable not to repay does not apply except where payment is pursuant to some fiduciary arrangement: see *Rodgers* v. *Ingham* (4). The real question is whether the payment was made voluntarily, irrespective of whether it was made before or after the issue of the writ.

Heald K.C. in reply. The court must come to some conclusion as to the footing upon which the money was paid. It is a necessary implication that when the money was paid both parties would have said that it should be refunded or accounted for if the plaintiffs won the action: see *Reigate* v. *Union Manufacturing Co. (Ramsbottom)* (5). It is inconceivable that the plaintiffs would have paid it on any other footing. *Rodgers* v. *Ingham* (1) does not support the defendants' preposition.

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(1) [1907] 1 K. B. 865, 871.

(2) (1909) 101 L. T. 741.

(3) (1930) 47 T. L. R. 110.

(4) (1876) 3 Ch. D. 351.

(5) [1918] 1 K. B. 592, 605.

Cur. adv. vult.

March 16. VAISEY J. read a judgment in which he stated the facts and continued: It is not as a rule easy to find the person in a government department (for so I may describe the defendants) who is the person with authority enabling him to bind that department as party to an agreement, or to waive on behalf of that department any of its legal rights. In the present case, I cannot find that there was here any express agreement in the matter, even assuming that Mr. Barnett had power to make one. The question here must in my judgment be put from a somewhat different angle, and I ask myself first with what intention the plaintiffs paid the money, and, secondly, with what intention the defendants received it? If the intention was the same on both sides, the result, in my judgment, was that an agreement was made between the parties by implication.

The intention of the plaintiffs was, to my mind, clear; they expected to recover the money if they won their action. What was the intention of the defendants? It is obviously irrelevant to speculate on what if anything was in the mind of the clerk or other subordinate officer who actually received the money, or in the mind of the officer (whoever he or she may have been) who paid it into the bank to the defendants' credit. I think that I must assume the existence of some person in the defendants' employment who accepted and appropriated the money with a full knowledge of all the facts, particularly the discussion which had preceded the institution of the action, and the pending of the action itself, who knew and realized that the right of the defendants to receive the money was at the moment sub judice, and indeed on the point of coming before this court for decision. What would that hypothetical person have thought about it? In my judgment, he would inevitably have come to the conclusion, as a matter of necessary inference, that the plaintiffs were paying and the defendants accepting the money subject to repayment if the action resulted in the plaintiffs' favour. If however he had entertained any doubt on the matter, I feel sure that he would as a matter I will not say of honesty but of courtesy refused to accept the money until the position had been made clear to him.

(1) [1876] 3 Ch. D. 351.

What is, to my mind, incredible, is that he could ever have supposed that the money was being either paid by the plaintiffs or received by the defendants with the intention or on the footing that the defendants were to keep it in any event. I come, therefore, to the conclusion that the intentions of the plaintiffs and the defendants were identical. In other words, I find that there was an agreement.

An alternative short answer to the problem might be that the plaintiffs cannot possibly be said to have been under a mistake as to the law, at a time when they were in the very act of asking the court to tell them what the law was. I need not, however, enlarge upon this point.

By the Crown Proceedings Act, 1947, the defendants are placed in the same position as the ordinary subjects of the Crown (see s. 21) (1) and I see no reason why they should not in appropriate cases refuse to refund money paid to them voluntarily under a mistake of law, as the Revenue Authorities were held to be entitled to do in the case of *William Whiteley Ld.* v. *The King* (2) and *National Pari-Mutuel Association Ld.* v. *The King* (3). At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control: see *In re Tyler* (4). Secondly, because the taxpayer, who is too often tempted to evade his liability and to keep in his own pocket money which he ought to have paid to the Revenue, will find too ready an excuse in the plea that the Revenue Authorities will, if they can, keep in their coffers, if they can get it there, money which the taxpayer was under no obligation to pay to them, and they had no right to demand. Although such an excuse would have no validity in either a court of law or in the forum of the taxpayer's own conscience, I think that, in the public interest,

(1) The Crown Proceedings Act, 1947, s. 21 (1): "In any civil "proceedings by or against the "crown the court shall, subject "to the provisions of this Act, "have power to make all such "orders as it has power to make "in proceedings between subjects, "and otherwise to give such appro-"priate relief as the case may "require . . . ."

(2) 101 L. T. 741.

(3) 47 T. L. R. 116.

(4) [1907] 1 K. B. 865.

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grounds for proffering it should, so far as possible, be avoided. While the defendants' resistance to the plaintiffs' claim in the present case has obliged me to make these general observations, I do not forget or overlook the policy of courteous consideration adopted, as a rule, by government departments in their dealings with members of the public, so that any deviation or apparent deviation from it is rightly regarded as exceptional.

I order the defendants to pay to the plaintiffs the agreed sum without interest, and also their costs of this application.

Judgment for the plaintiffs.

Solicitors: *Titmuss, Sainer & Webb; Sir Nazeby Harrington, Solicitor to H.M. Customs and Excise.*

I. G. R. M.

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Mar. 4.

In re HUNTINGTON'S SETTLEMENT TRUSTS.

STRUTHERS *v.* MAYNE AND OTHERS.

Settlement—Trusts of four funds for three daughters and a son—Trust for son absolutely on attaining age of thirty years—Accruer clause—Accruer of fund the trusts whereof "shall fail or determine" to the other or others "of which the trusts . . . . shall not then have failed "or determined"—Payment of fund to son on attaining thirty years of age—Death of son—Subsequent death of a daughter a spinster—Accruer of daughter's fund.

By a settlement dated January 3, 1903, the settlor created trusts of four funds for each of three daughters and a son. Each of the daughter's funds was settled on trust for her for her life with remainder over for her issue on the usual trusts. As regards the son's fund, it was provided that when he should attain the age of thirty years the trustees were to stand possessed thereof in trust for him absolutely, with certain intermediate trusts meanwhile. An accruer clause in the settlement provided that ". . . . in case the trusts . . . . concerning any of the said trust "funds . . . . shall fail or determine . . . . such trust fund ". . . . shall . . . . accrue . . . . to the others or other of the "said trust funds of which the trusts hereinbefore declared shall "not then have failed or determined and if more than one in "equal shares and proportions and every such accruing share "shall be held upon the trusts . . . . herein declared and con-"tained concerning the said trust fund to which the same shall "be added or as near thereto as circumstances will permit . . . ." On October 22, 1914, the son attained the age of thirty years and became absolutely entitled to his original fund which was paid over to him. On July 7, 1944, he died. On January 20, 1948, one of the daughters died a spinster. On a summons to determine, inter alia, whether the property for the time being representing or held on the same trusts as that daughter's fund accrued on her death to and equally betweeen the other two daughters' and the son's funds or the other two daughter's funds alone :

Held, in deciding that it accrued to and equally between the other two daughters' and the son's funds, (1.) that the settlor, when using in the accruer clause the expressions "shall fail or "determine" and "shall not then have failed or determined," could not have meant to include determination merely by payment to someone absolutely entitled, since he could not have meant the clause to operate to take away the share of someone who had become absolutely entitled ; (2.) that the words "or determine" had probably been added to meet what might be termed a partial failure—i.e., a failure after the trusts had operated up to a point—and that the words made it clear that a partial failure would bring the accruer clause into operation ; (3.) that the use of the double expression "fail or determine" could be accounted for in that way, without so pressing the meaning of "determine" as to make it apply to a share—such as the son's—which had become absolutely and finally vested and had been paid out ; (4.) that the trusts of the son's share had not "failed or "determined," since the trust for him "absolutely" still subsisted and the payment over of his original fund to him by the trustees had not brought about a failure or determination of the trust for the purposes of the accruer clause.

Observations on the precedent of accruer clause in Prideaux' Precedents in Conveyancing, vol. 3, 23rd ed., 1937, at pp. 745-746.

ADJOURNED SUMMONS to determine a question arising on an accruer clause contained in a settlement executed on January 3, 1903. The following statement of the facts is taken substantially from the judgment of Jenkins J.

The case concerned the destination of one of the trust funds comprised in a settlement made on January 3, 1903, by William Balle Huntington. The scheme of the settlement was to create a separate trust fund of certain specified investments for each of four children of the settlor. The trusts declared concerning each of the shares of three daughters were for the daughter for life with remainders over for her issue on more or less usual lines : but in the case of the son, Lionel, there were trusts to take effect until he was twenty-one, trusts applicable between his ages of twenty-one and thirty, and then a trust in these terms : ". . . . the trustees shall "if and when the said Lionel Welby Huntington shall attain "the age of thirty years stand possessed of 'Lionel's trust "'fund' in trust for the said Lionel Welby Huntington "absolutely." There was an accruer clause in the settlement in the following terms: ". . . . in case the trusts herein-"before declared concerning any of the said trust funds, "namely, 'Kate's trust fund,' 'Mabel's trust fund,' 'Elsie's "'trust fund' and 'Lionel's trust fund' shall fail or determine "then subject to the trusts powers and provisions herein "declared and contained or by law vested in the said trustees "or trustee concerning the same trust fund and to every "or any exercise of any such powers such trust fund as well "as any share or shares accruing or added thereto by virtue "of this proviso and the income thereof shall go and accrue "by way of addition to the others or other of the said trust "funds of which the trusts hereinbefore declared shall not "then have failed or determined and if more than one in equal "shares and proportions and every such accruing share shall "be held upon the trusts and subject to the powers and "provisions herein declared concerning the said trust fund "to which the same shall be added or as near thereto as "circumstances will permit and in case the trusts hereinbefore "declared of each of the other of the said trust funds shall "then have failed or determined the said trustees or trustee "shall stand possessed of such trust fund including all additions "or accretions thereto under this proviso in trust" as therein mentioned.

Lionel attained the age of thirty years on October 22, 1914, and died on July 7, 1944. One of the four children, Emily Mabel Huntington, died a spinster in January, 1948, and it became necessary to decide what was the effect of the accruer clause having regard to the fact that, before her death without issue (thereby bringing the accruer clause into operation with respect to her share), Lionel had become absolutely entitled and had had his share paid over to him under the trust applicable on his attaining the age of thirty. By this summons one of the trustees of the settlement asked, inter alia, whether the property for the time being representing or held on the same trusts as Mabel's trust fund accrued on Emily Mabel Huntington's death to and equally between (*a*) Kate's, Elsie's and Lionel's trust funds, or (*b*) Kate's and Elsie's alone.

R. Cozens-Hardy Horne for the plaintiff.

J. F. Bowyer for those interested under the trusts of the settlement. The accruer is expressed to be intended to operate in favour only of those trust funds the trusts of which are still on foot. That is the obvious and only possible meaning of the words " . . . . shall . . . . accrue . . . . to " the others or other of the said trust funds of which the trusts " hereinbefore declared shall not then have failed or determined . . . ." The trusts of Lionel's trust fund determined when his fund was paid over to him, long before the accruer clause became operative in respect of Mabel's trust fund. On being paid over to him it became free of all trusts. The contention that it does not participate in this accruer is borne out by the form of accruer clause in Prideaux's Precedents in Conveyancing, vol. 3, 23rd ed., 1937, at pp. 745—746, which is a typical form of accruer clause and is in the following terms: " If any daughter [child] of mine shall not have any child who " under the trust . . . . hereinbefore contained attains a " vested interest in [his or] her share, then . . . . the . . . . " share of such daughter [child] . . . . shall accrue to and " be held . . . . in trust for my other children or child (not " being daughters [children] or a daughter [child] the trusts " for whom and whose issue have failed or determined other- " wise than by the absolute payment or transfer of a share) " who attains the age of twenty-one years, or being female " marry under that age, and, if more than one, in equal " shares." There, children " the trusts for whom and whose " issue have failed or determined " are excluded, just as in the present case is any trust fund of which the trusts shall have failed or determined. Prima facie such an exclusion will extend to those the trusts for whom have failed or determined by their having their share paid or transferred to them absolutely. That must be the very reason why the words " otherwise than by the absolute payment or " transfer of a share " were added in the precedent in Prideaux. They are not in the settlement in the present case: and the result must be that Lionel's trust fund, the trusts of which have " failed or determined," must be excluded from participating in the accruer, since payment over of his fund to him (i.e., the " absolute payment or transfer of a share " expressly excepted in the precedent in Prideaux) is not excepted in the settlement. True, the words " otherwise " than by the absolute payment or transfer of a share " are not in any edition of Prideaux earlier than 1913; true, also, they do not appear in any other book of precedents, both Key and Elphinstone and Mr. Hubert Rose's book providing that the shares of which the trusts fail or determine shall accrue to the shares of the other children to be held on the same trusts as the original shares. Nevertheless, the mere fact that the draftsman of the form in Prideaux thought it necessary to add the words "otherwise than by the absolute "payment or transfer of a share" is a strong if not conclusive argument that Lionel's trust fund cannot participate in this accruer.

A. A. Baden Fuller for the son Lionel's executors. Quite apart from arguments based on precedents, the settlor cannot have intended to exclude from participation in accruer the very persons whom he intended to benefit, of whom Lionel was one. The word "determined" as used by him could not have meant "determined by having his or her share paid "out to him." Lionel's trust fund still exists quoad the settlement, notwithstanding that it became his absolute property. Of course it became "free of all trusts" on being paid over to him: but that simply means free of all restrictions in his hands; it does not mean that it was forthwith deprived of all benefits to which it was entitled under the settlement. This contention is borne out by the very fact that Mr. Hubert Rose and the editors of Key and Elphinstone have not thought it necessary to use the words that appear in Prideaux and that it was not thought necessary in editions before 1913 of Prideaux' work. In the present case the accruer is "to the "others or other of the said trust funds of which the trusts "hereinbefore declared shall not then have failed or determined "and if more than one in equal shares and proportions and "every such accruing share shall be held upon the trusts . . . . "herein declared and contained concerning the said trust "fund to which the same shall be added or as near thereto "as circumstances will permit . . . ." The result is that, Lionel having had his share absolutely, anything now accruing to that share must belong to his estate, absolutely.

JENKINS J. It is argued that Lionel's trust fund cannot participate in this accruer, inasmuch as it is within the meaning of the clause a trust fund of which the trusts had determined before the date of accruer. Obviously the trusts had not failed, but it is said that they had determined because, Lionel having become absolutely entitled, the trustees had paid away his trust fund to him and it was completely out of their hands; they had no further function to perform as trustees with respect to Lionel's trust fund, and it could not be said that the fund which Lionel received remained in his hands subject to any trusts whatever. The effect of that contention, if it prevailed, would be to make the accruer of Mabel's trust fund an accruer in equal shares between Kate's trust fund and Elsie's trust fund, to the exclusion of Lionel's trust fund. On the other hand, it is said that, whatever the word "determined" may mean in some contexts, it is clear that here it is not used in the sense contended for on the other side. To put it in another way, there has been no determination of the trusts of Lionel's trust fund in the sense in which the word "determined" is used here.

The argument for the exclusion of Lionel's trust fund from participation in the accruer derives some support from the forms in Prideaux's Precedents in Conveyancing, to the 23rd edition of which, dated 1937, I have been referred. The learned editor of the edition in question includes, vol. 3, at pp. 745, 746 and 788, specimen forms of accruer clauses. The form of the accruer clause on pp. 745 and 746 is typical. It is said that that precedent excludes children the trusts for whom and whose issue have failed or determined, just as the accruer clause in the settlement before me excludes any trust fund of which the trusts hereinbefore declared have failed or determined. The precedent, having made that exclusion, goes on to limit it by saying "otherwise than by the absolute "payment or transfer of a share." There are no similar words in the accruer clause here, and it is said, therefore, that—in the view at all events of the draftsman of the precedents—the exclusion of a share the trusts of which have failed or determined would exclude a share which had been paid out to someone absolutely entitled and, therefore, the words "otherwise than by the absolute "transfer of a share" were considered necessary to prevent the reference to determination extending to determination by payment out of an absolutely vested share.

I have been referred to a number of editions of Prideaux, and it seems that the words "otherwise than by the absolute "payment or transfer of a share" first appeared in the 1913 edition, the editors of earlier editions apparently having thought that the desired result could be produced by simply excluding from the benefit of the accruer shares the trusts of which have failed or determined. So far as counsel's researches have gone, the particular form of words seems to be peculiar to Prideaux's Conveyancing Precedents—the forms in Key and Elphinstone, and in Mr. Rose's book, proceed on a somewhat different principle, the accruer being made simply to the shares of the other children with a provision to the effect that accruing shares shall be held upon the same trusts as the original share. That form, of course, gets over any such difficulty as is now raised, and yet has the desired result of bringing the accruing share ultimately over to what I may call the "effective" settled shares, because although the accruer in the first instance would include a share the trusts of which had failed, the portion accruing to such a share would forthwith accrue over again to the shares the trusts of which were still subsisting. By the use of that form the result is, as desired, to make the accruer be for the benefit of the "effective" shares and no others.

The presence in Prideaux's Precedents of the words "other-"wise than by the absolute payment or transfer" to a person absolutely entitled no doubt does give rise to a question, because prima facie the editors of conveyancing precedents do not put in words which are mere surplusage; so the presence of these words in the forms from Prideaux which I have quoted does raise the doubt whether the word "determined" may not include determination by absolute payment or transfer. Be that as it may, what has to be decided is the meaning of the words "fail or determine" in this particular accruer clause. I think that, in some contexts, it might be truly said that the trusts of a settled share have determined when somebody has become absolutely entitled and the fund has been paid over to him; but it does not follow that in all contexts the words have that meaning. Here the settlor in the accruer clause refers specifically to "the trusts herein-"before declared concerning any of the said trust funds, "namely, 'Kate's trust fund,' 'Mabel's trust fund,' 'Elsie's "'trust fund' and 'Lionel's trust fund'," and he introduces the accruer clause in case the trusts of any of those specifically mentioned trust funds shall fail or determine. When he says "fail or determine" at that point in the accruer clause he clearly cannot, in my judgment, mean to include determination by payment to somebody absolutely entitled, because it cannot have been his intention that when somebody became absolutely entitled the accruer clause should operate to take

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the share away from him or her. Quite plainly he cannot have intended any such thing. I do not think that it is to the point to say that the accruer is made "subject to the trusts "powers and provisions hereinbefore declared." The fact remains that the accruer is limited to operate with respect to shares the trusts of which have failed or determined, and if they have failed or determined then it operates "subject "to the trusts powers and provisions hereinbefore declared."

Accordingly, in my judgment, the trusts of Lionel's trust fund cannot have failed or determined within the meaning of that phrase where it first occurs in the accruer clause. It follows that, when the phrase occurs again in the passage setting out the destination of the accruing share and one finds that the destination is limited to "Trust Funds of which "the trusts hereinbefore declared shall not then have failed "or determined," the word "determined" cannot extend to a share paid out to somebody absolutely entitled, for the simple reason that I think that this precisely similar phrase occurring twice in the same clause must be given the same meaning in the two places in which it occurs. I think that it is really reasonably plain that the settlor is distinguishing the trust funds into two classes. With regard to trust funds the trusts of which fail or determine, the accruer clause comes into operation against them. On the other hand, with regard to shares the trusts of which have not failed or determined, the accruer clause operates in their favour. It is to be noted that, in the ultimate trust the same phrase occurs again: "And in case the trusts hereinbefore declared of each of the "other of the said trust funds shall then have failed or "determined," the ultimate trust is to take effect. I should have thought that it would be very difficult to construe "failed or determined" in that place in the clause as extending to a share paid out to somebody absolutely entitled, for if that were so then in all circumstances, so far as I can see, the ultimate beneficiary must be the cestui que trust under the ultimate trust, for, unless the settlement were framed so as to go on for ever and thus infringe the rule against perpetuities, there would be bound to come a time when some person or persons became absolutely entitled to the fund and it was paid over to them; and, of course, in that third passage in which the words "failed or determined" occur, it is equally true that the meaning to be attributed to them must, according to all ordinary principles of construction, be the same as the meaning they bear where they previously occur.

The precise meaning of the words "fail or determine" is rather difficult to define, but I think that the words "or "determine" are added to this quite common conveyancing phrase so as to meet the case of what may in a sense be termed a partial failure. Quite commonly clauses of this kind with regard to ultimate trusts are introduced simply by the words "if the trusts hereinbefore declared shall fail," and that I should have thought would in all ordinary circumstances be quite enough; but it might possibly be argued in certain circumstances that, although the trusts of the fund or of the particular share had come to an end, they could not be said to have failed. A simple reference to failure, it might be argued, is appropriate only to total failure, so that where income has been applied, or powers have been exercised, in favour of a beneficiary entitled to a limited interest or contingently entitled and then the trusts fail, it might be said that the words "shall fail" simpliciter would not be appropriate to such a case, because the trusts have come into operation and have been in operation up to a point and to a certain extent, and then have come to an end. All doubts of that sort would be resolved by adding the words "or determined." That makes it quite clear that such partial failure as I have endeavoured to describe would suffice to bring the accruer or the ultimate trust, whatever it may be, into operation. I think that in this case the use of the double expression "fail or "determine" can be accounted for in that way without pressing the meaning of the word "determine" so as to make it include a share, such as Lionel's share, which had become absolutely vested and had been paid out. I certainly do not think that there is anything in the phrase "fail or "determine" to constrain me as a matter of language to come to any such conclusion. In the context where the phrase occurs it certainly seems to me reasonably plain that any such conclusion would be the wrong one, as the result which it would produce would, so far as I can see, be in the highest degree capricious in that it would or might exclude from participation in the accruer persons whom one would think the settlor would have intended most to benefit.

For these reasons, notwithstanding the forms which appear in Prideaux's Precedents in Conveyancing, and notwithstanding the ingenious argument presented to me by Mr. Bowyer for those interested under the trusts of the settlement, I am of opinion that Lionel's trust fund should participate in the accruer brought about by the death of Mabel without issue, and is not excluded from such participation by the limitation of the trust funds in whose favour the accruer is to take place to the "trust funds of which the trusts hereinbefore declared "shall not then have failed or determined." In my judgment, the trusts of Lionel's share had not failed or determined; there was still in operation the trust for him absolutely, and the fact that the trustees had paid his fund over to him did not, in my judgment, bring about a failure or determination of that trust for the purposes of this accruer clause. Accordingly, the property for the time being representing or held on the same trusts as Mabel's trust fund accrued on her death to and equally between Kate's, Elsie's and Lionel's trust funds.

Declaration accordingly.

Solicitors: *Johnson, Jecks & Colclough; Young, Jackson, Beard & King.*

K. R. A. H.

THE RAILWAY EXECUTIVE (FORMERLY THE LONDON & NORTH EASTERN RAILWAY COMPANY) *v.* WEST RIDING OF YORK COUNTY COUNCIL.

C. A.

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Mar. 14, 25.

Somervell and Evershed L.JJ. and Wynn-Parry J.

Railway company—Level crossing—Company authorized to construct railway above level of highway—Highway raised on inclined planes to cross railway—Mining operations cause railway and highway to sink—Railway rebuilt on original level—No duty on railway company to raise level of highway—South Yorkshire, Doncaster, and Goole Railway (Deviation and Extension of Elsecar Branch) Act, 1850 (13 & 14 *Vict. c.* xxxv), *ss.* 3, 8, 13—*Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict., c.* 20), *s.* 16.

By the South Yorkshire Doncaster, and Goole Railway (Deviation and Extension of Elsecar Branch) Act, 1850, which incorporated the provisions of the Railway Clauses Consolidation Act, 1845, the plaintiffs' predecessors, a railway company, were authorized to make and maintain certain lines of railway and in particular to construct a railway across W. Street, a public highway, at a level of eight feet above that highway. It accordingly became necessary to raise the highway by inclined planes to enable it to cross the railway at the G. level crossing. These works were duly constructed by the railway company. In 1942 mining operations caused the subsidence both of the railway and highway. This did not impair the utility of the highway but it became necessary for the safe working of the line to restore the

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railway to its original level. This was done by the railway company in 1945. Such restoration made it also necessary to raise and regrade the approaches of W. Street to the crossing at a cost of 479*l.* 5*s.* 7*d.* The defendants, who were the highway authority responsible for the repair of W. Street, contended that these costs of raising the roadway should be borne by the plaintiffs. Roxburgh J. held that the defendants the highway authority were not entitled to require the plaintiffs, as owners of the railway, to regrade the approaches to the level crossing.

Held, dismissing the appeal, that neither the private Act of 1850 nor the Railways Clauses Consolidation Act, 1845, imposed any obligation on the railway authority to maintain the approaches of the highway to the level crossing. The highway authority were only entitled to require the railway authority to keep their own railway in order and could not call on the railway authority to regrade the approaches of the highway so as to bring them again up to the original level of the railway. *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Ry. Co.* [1903] 2 K. B. 394 considered.

APPEAL from Roxburgh J.

The South Yorkshire, Doncaster, and Goole Ry. Co. (the predecessors of the original plaintiffs the London & North Eastern Ry. Co.) were authorized by s. 3 of the South Yorkshire, Doncaster, and Goole (Deviation & Extension of Elsecar Branch) Act, 1850, " to make and maintain " certain lines of railway in the West Riding of Yorkshire upon the levels therein defined. In particular they were authorized by s. 8 to construct a railway " upon the level " of a public carriageway known as West Street at Worsbrough. " Upon " the level " was admittedly a term of art, because the Act authorized the railway company to construct the railway eight feet above the level of the highway. Accordingly, two raised approaches had to be constructed to carry the highway up to the level of the railway which it crossed at a level crossing known as the Glasshouse Level Crossing The Act of 1850 incorporated the Railways Clauses Consolidation Act, 1845. West Street was a county road and the defendants the County Council of the West Riding of Yorkshire were the highway authority responsible for its repair.

In 1942 the working of minerals under the railway caused both the railway line and the highway at the Glasshouse level crossing to sink. The subsidence did not adversely affect the highway but it became necessary for the safe working of the railway for the line to be restored to its old level. This was done in 1945, and the railway line was put back on the level authorized by the Act of 1850. When the line was raised, it became necessary to raise and regrade the approaches of the highway to the level crossing. This work was done by the railway company at a cost of 479*l.* 5*s.* 7*d.*

By this summons the railway company asked whether upon the true construction of the Act of 1850 and of the Railway Clauses Consolidation Act, 1845, the plaintiffs, as successors of the South Yorkshire, Doncaster, and Goole Ry. Co. were at any material time after the construction of the works authorized to restore and repair the railway line at the Glasshouse level crossing to the statutory level in such a manner as to cross West Street otherwise than on the level of the highway and so that unless the approaches to the level crossing were regraded the highway would be obstructed. Roxburgh J. refused to answer the question thus raised in terms but declared that, in the events which had happened, the defendants the highway authority were not entitled to require the railway company to regrade the Glasshouse level crossing approaches or to recover from the railway company the cost of regrading such approaches. He held that the matter was covered by the decision of Wright J. in *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Railway Company* (1).

The defendants, the highway authority, appealed. The Railway Executive were respondents to the appeal as successors to the original plaintiffs, the London and North Eastern Ry. Co.

Erskine Simes K.C. and *H. Parrish* for the appellants. The restoration of the railway was ultra vires because the statutory powers conferred by the Act of 1850 and the Railways Clauses Consolidation Act, 1845 (2) do not authorize the exercise of the railway company's powers of maintenance in such a way as to obstruct a public highway. A railway company has no power to obstruct the highway unless such a power is expressly given to it by statute. The appellants rely on ss. 46 and 53 of the Act of 1845. He referred to *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Railway Company* (1); *Hertfordshire County Council* v. *Great Eastern Railway Co.* (2); *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (3). The statutory power to construct the railway did not confer power to obstruct the highway. The powers of maintenance conferred by s. 16 of the Act of 1845 are subject to the restrictions imposed by the Act of 1850 and cannot be exercised in such a way as to obstruct the highway.

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(1) [1903] 2 K. B. 394.

(2) The Railways Clauses Consolidation Act, 1845, by s. 16, after authorizing any company for the purpose of constructing the railway to execute certain works including upon roads permanent inclined planes, provides that the company " may from time to time " alter, repair, or discontinue the " before-mentioned works or any " of them, and substitute others " in their stead, and they may do " all other acts necessary for " making, maintaining, altering, or " repairing and using the railway."

Sir Andrew Clark K.C. and *J. B. Herbert* for the respondents. The railway company had a right and was indeed under a duty to maintain the line at its original level. The works which were done to the railway line were pure works of maintenance under the powers conferred by s. 3 of the Act of 1850 and by s. 16 of the Act of 1845. Those sections confer powers to maintain the railway company's works on its own property. They do not authorize the execution of works on other persons property or impose any obligation to do such works. Sections 46 and 53 of the Act of 1845 have no application to this case, as these sections are only dealing with the construction of original works. Where a statutory obligation is imposed to do works on the land of third persons, this is expressly stated. The Attorney-General could not apply here for an injunction to restrain the railway company from obstructing the highway, as a statutory authority cannot be restrained from carrying out the work it has been authorized to do. The remedy of any person injured is an action for damages: *Emsley* v. *North Eastern Ry. Co.* (4); *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works* (5). The interference there has been with the highway was by the colliery. All the railway company did was to restore its own property. It owed no duty to the highway authority to raise the highway to the original level and to make good the damage caused by the colliery's workings. The obligation to make good this damage was on the highway authority.

Somervell L.J. This is an appeal by the defendants to the originating summons, the County Council of the West Riding of Yorkshire, from a decision of Roxburgh J. The problem arises in this way. In 1850 the predecessors of the plaintiffs, The South Yorkshire, Doncaster, and Goole Ry. Co., were authorized by a special Act, which incorporated the Railways Clauses Consolidation Act, 1845, to make and maintain certain railways and in particular to construct a railway " across " and upon the level of " a public road in the township of Worsbrough. That level crossing, as it is ordinarily called, was constructed and, although I myself do not think that this affects the issue of the present appeal, it was a case in which the railway company wanted the level of their railway to be somewhat above the level of the road as it existed before. In those circumstances, under their statutory powers it was their duty to build what are called " inclined planes," so that those who used the highway were gradually taken up a slight incline to the new higher level at which it suited the railway to cross the road. The road in question is a county road and, the defendants as highway authority are responsible for it under the Local Government Act.

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(1) [1903] 2 K. B. 394.
(2) [1909] 2 K. B. 403.
(3) [1915] A. C. 654.
(4) [1896] 1 Ch. 418.
(5) [1898] 2 Ch. 603.

There are minerals under this part of the county where the level crossing is and there has been subsidence and, owing to this subsidence, the railway line at the level crossing and highway have both sunk. That sinking does not adversely affect the highway, in that to those who use the highway, motor cars, carriages, people and so on, if there were no railway there, the highway could remain subsided to the extent at any rate to which it is at present without inconvenience. The subsidence with regard to the railway, however, has made it in such a condition that it is agreed that it must be put back to the old level. In the agreed statement of facts this matter is dealt with in these words : " Owing " to such subsidence of the railway lines at the said level " crossing the maintenance and safe working of the railway " could only be ensured by the plaintiffs restoring the same " to the level shown on an agreed plan section and cross " sections annexed hereto . . . . being a level authorized " by the said special Act and such restoration was carried out " by the plaintiffs in or about August, 1945 " ; that is to say, the old level which was authorized under the statute and at which the line was constructed in 1850 or some time shortly after that. It being, I think, clear that the railway company have to put their line back to this level, as being necessary for safe working, if nothing was done about the road, the road would have been obstructed and unusable for the purposes for which highways exist. We have not the actual dimensions, but it is common ground that, when the railway was put back to the old level, if the highway was to remain usable, it had to be graded up and an incline made.

The question in this case can, I think, be formulated in this way: Have the railway company, when they execute these works, themselves to see, and at their own expense, that the highway remains usable and is usable as and when the whole job is over? It is necessary to refer shortly to some of the provisions of the special Act, which is The South Yorkshire, Doncaster, and Goole Railway (Deviation and Extension of Elsecar Branch) Act, 1850. That Act incorporates the Railways Clauses Consolidation Act, 1845. Section 3 is important: " It shall be lawful for the said " company to make and maintain the new or substituted " lines of railway, and also the extension railway and branch " railways hereinafter particularly described, with all proper " works, stations, approaches and conveniences connected " therewith, in the lines and upon the lands delineated on the " said plans and described in the said books of reference, and " according to the levels defined on the said sections, and to " enter upon, take and use such of the lands as shall be necessary " for such purposes."

The next section that I propose to refer to is s. 8. That deals with the level crossing and provides: " It shall be lawful for " the company to construct the railways hereby authorized " across and upon the level of the turnpike roads and public " roads numbered in the first-mentioned deposited plans as " follows"; then they are numbered and the one referred to is No. 103. Then there is a provision, which I myself do not think assists very much, about the company having to erect a station or a lodge at level crossings. Section 12 provides: " The powers of the company for the compulsory purchase " of lands for the purposes of this Act shall not be exercised " after the expiration of three years from the passing of this " Act." Then s. 13 provides: " The works hereby authorized " shall be completed within five years from the passing of this " Act, and on the expiration of such period the powers by this " Act granted to the company for executing such works, or " otherwise in relation thereto, shall cease to be exercised, " except as to so much thereof as shall then be completed." We were referred to some sections of the Railways Clauses

Consolidation Act. Section 16, the whole of which I will not read, reasserts what is contained in s. 3 of the special Act: that is to say, the right of the railway company from time to time to alter and repair the before-mentioned works and to substitute others and that they "may do all other acts necessary "for making, maintaining, altering or repairing, and using "the railway." It reasserts the right of maintenance which is in question here.

Sir Andrew Clark submitted that any power contained in an earlier part of the section, for example, to make inclined planes, was a power which related only to the period of construction and lapsed after five years. I think that it is unnecessary in order to decide this case to lay down that that as a matter of law is necessarily right. I can see that difficult questions might arise, though I do not think that they arise in this case. The railway company clearly being authorized to maintain, if it could be shown that some power in the earlier part of s. 16 was necessary for the proper exercise of their right and in a sense their duty of maintenance, it may be that such a right would necessarily be implied. Section 46 was referred to and that, I think, is an important section. It says this, broadly: that, if a railway company gets power from Parliament to cross a road, it must do so by a bridge, unless it gets power in its special Act to do so by a level crossing. Then s. 47 is, again, a provision about what is to be done at level crossings. Section 53 was relied on as emphasizing (and I think that this is the effect of it) the undoubtedly great stress laid in this Act on the necessity for railway companies, in constructing their works, seeing that the public right of user of highways is not interfered with. If they are going to interfere with it, then they have to make a substituted road and so on. Those are the relevant sections.

The learned judge regarded this case as really covered and concluded by the decision of Wright J., subsequently approved in the House of Lords, in *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Ry. Co* (1).

The headnote in that case is as follows: "A railway company "being authorized to carry their railway across a high road "upon the level, constructed the railway at a slightly higher "level than the road, and, in order to bring the road up to the "level of the railway, raised it by means of inclined planes on "either side of the railway under the powers conferred by

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(1) [1903] 2 K. B. 394, 397.

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"s. 16 of the Railways Clauses Act, 1845. *Held,* that there "was no obligation upon the railway company to repair the "roadway upon the inclined planes, notwithstanding that their "act in inclining its surface might have made its maintenance "more expensive than before."

There was a short judgment of Wright J., and he adopted the submission of Mr. Rowlatt, as he then was. He said: "I agree with Mr. Rowlatt that under s. 56 the obligation of "the company is discharged as soon as they have restored "the road to as good a condition as it was in before it was "altered." I think that the effect of that decision is that, where a railway company, because it wants to cross at a higher level, does construct these inclined planes, once it has constructed them and provided that it has constructed them properly and that they are in good and proper condition, they then are to be treated as a highway and the fact that they have been constructed by the railway company becomes from that moment irrelevant and the highway authority have such duties and such obligations towards them as if they had not been constructed by the railway company.

If that is right, the question in this case is, as it seems to me, unaffected by the fact that in the present case there were these inclined planes constructed by the railway company. It would, I think, be curious if the relation as between highway authority and railway company depended on whether, when a level crossing was made, there had been a slight raising of the level or not. The problem which arises is a problem which has to be decided, but it would be illogical if it depended on whether that had or had not happened when the railway was first constructed.

I think that one has to approach this problem on the basis of the fact that when the railway was made, for the purposes of carrying out the statute enabling the railway to be made, there was a level crossing and it is quite plain that the actual altitude of that level crossing was a matter of importance to the railway. The gradients which railways can have are limited. That was the status quo before the subsidence. The next point to bear in mind, I think, is that the railway company have authority to "maintain" what they constructed under statutory authority. I regard the maintaining which they are authorized and entitled to do in the present circumstances, as authorizing and entitling them to maintain this particular portion of railway line at the level at which it was constructed. No doubt if there were such a small subsidence that it did not matter to them, they may not bother to do it. It is clear from the agreed statement of facts that in this instance the subsidence does matter, and they are entitled to maintain the line there. The only question is whether they have to do the work which results on the highway.

The most attractive way of putting the case for the appellants, I think, is to say, as Mr. Simes did, that from the point of view of what the defendants were interested in and from the point of view of their duties, there was no need to do anything; the highway was a perfectly good highway after the subsidence from their point of view. I was at one time attracted by that way of putting it; but I have come to the conclusion that the learned judge was right, though I cannot regard the case as so completely covered by the judgment of Wright J. as he did.

I approach it by a simple method, but one which, I hope, leads to the right result. If the highway had sunk and the railway had remained at its level, I do not think that there is any doubt that the highway authority would have had to have borne the expense of raising the highway and keeping it in a usable condition. They would have had, I think, no case for saying that the railway had to pay or was in any way liable, and they could not have based any case on the argument: If you were not here, it would not matter that the highway subsided, as it has, a foot or two. They could not have based any claim on that. Equally, of course, if the railway had sunk without the highway, the railway company would have been entitled and might have had to maintain their line so as to bring it up to the old level which had been fixed under the application of the old statute.

In the course of the argument I suggested this possible view of the facts. Supposing that a subsidence had taken place and the railway company had been able to take steps to see that the railway line itself did not subside, but the roadway subsided, as in the case I put just now, I do not think that it could have been suggested that the highway authority could have had any claim against or made the railway company in any way pay for or contribute to the cost of the raising of the highway. I do not think that it makes any difference that these two things have happened together. I think that the result of the railway being built at that level became a matter which the highway authority had to take into account and which did or might in certain circumstances and has in these circumstances thrown on it duties and obligations in order to keep the highway available for the public, which would not have been there if the railway had not been built under statutory authority.

For those reasons I think that the learned judge was right and that, in the events which have happened, the railway company are entitled to put back their railway in the position in which it was without themselves raising the highway, and I doubt if they have power to do this, or bearing the expense which the defendants incur in so doing. No doubt they have to give and have given due notice to the highway authority, so that the highway authority can make its own proper arrangements to see that as that is done the highway is at the end in a usable condition and is obstructed as little as possible in the course of the work. For these reasons I think that the appeal fails.

EVERSHED L.J. I agree. I think that the case is not by any means free from difficulty and I was at one time somewhat impressed with the possible point that, if the railway company was entitled to restore the level of its line, without any obligation to do anything as regards the inclined planes or approaches, they would in the end be left with having crossed a turnpike road or public highway other than on the level, as authorized by the special Act, or otherwise than by a bridge, as authorized by s. 46 of the Railways Clauses Consolidation Act, 1845; but I think that the answer to that point is provided by Sir Andrew Clark by saying that both the provision in the special Act and s. 46 are directed to the construction of the line. Therefore, that particular point, I think, falls down.

The facts of the case are obviously very special. This is not a case of ordinary repair of the approaches, though, having regard to s. 46, it is significant that s. 46 does impose an obligation, as I follow it, to maintain the approaches to bridges, though not the approaches to level crossings. As Somervell L.J. has pointed out, in this case, owing to the activities of third parties namely, a colliery undertaking, the land on which rested both the railway line and a highway subsided; they might have subsided not together, but so that, on any view, each party concerned would have had to do restoration work; but, as it turned out, the subsidence has so operated that the highway authority is quite able to allow things to remain as they now are, though that is not the case with the railway company. As pointed out in the agreed statement of facts, unless the level is restored, the line cannot be safely maintained; so that the railway company, in effect, must restore their line to the level at which it had been before the subsidence took place. Put in another way, they seem to me really to have put themselves in the position that they would have been in had the subsidence affected only the approaches to the railway.

I think, for the reasons which my Lord has already stated, that the result is that the highway authority cannot call upon the railway company to do more than put their own line in order; that is to say, they cannot call upon the railway company to undertake the obligation of bringing the highway up to the original level, now restored, of the railway. For these reasons, as well as those stated by my Lord, I think that this appeal fails.

Wynn-Parry J. I agree. I only desire to add a few observations on one point. It was argued attractively by Mr. Erskine Simes that, after the subsidence, the road was still fit for its purpose as a highway, although the railway was not fit for its purposes, and that in those circumstances, if the railway company wanted to raise the railway to the old level, they must also be responsible for raising the approaches. I do not consider that this position follows. The result of the exercise by the railway company of the powers given to it by the special Act and the Railways Clauses Consolidation Act, 1845, was that at the expense of the railway company the level of the road at and approaching the level crossing was raised and it was so raised for the purpose of enabling the railway to cross at a higher level necessitated for the purpose of the railway. So long thereafter as the railway existed and and was operated, the railway and the road must, as it seems to me, be linked in this sense: that they must be at a common level, in order to allow the railway to operate across the road and the public to use the road across the railway. The result is, to my mind, that thereafter the road is, so to speak, tied to a particular level, because ex hypothesi, the railway, to be safe, must operate at the higher level. There was thereafter the duty on the highway authority to maintain the approaches at that level which is required to enable the public to use the

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road, having regard to the right and obligation of the railway company to maintain the railway at the proper level.

A common disaster occurred, in the shape of subsidence, affecting both the road and the railway, and it is agreed that, in order to discharge its statutory obligations, the railway company had to raise the railway to its former level. It follows, in my view, that the highway authority had cast on it the duty to raise the road to what I have called the tied level, in order that the public should be enabled to continue to use the road, which is now one which Parliament has authorized to be crossed by a railway, and for the safe working of that railway to be raised to and maintained at a higher level. For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Cummings, Marchant & Ashton for Bernard Kenyon, Wakefield*; *E. Coleby.*

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Somervell and Evershed L.JJ. and Wynn-Parry J.

In re PRESS CAPS LD.

Company—Offer by a company to acquire shares of another company—Acceptance by more than nine-tenths of the latter's shareholders—Application by dissenting shareholders not to have their shares taken over—Whether unfair offer—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 209.

In December, 1947, an offer was made by M. Co. to acquire all the ordinary shares of P. Co. at a price substantially above their market price which was accepted by the holders of more than nine-tenths in value of the P. Co. shares. After the expiration of four months M. Co. gave notice to the dissenting shareholders under s. 155 of the Companies Act, 1929 (now the Companies Act, 1948, s. 209, as modified by sub-s. 6 in the case of offers made before this Act came into force) that unless on the application of any dissenting shareholders within one month the court thought fit to order otherwise, M. Co. would be entitled to acquire their shares on the terms of the offer. Two of the dissenting shareholders applied to the court for a declaration that M. Co. was not entitled to acquire their shares upon the terms of the offer. The main ground of this application was that the offer was unfair having regard to an item in the balance sheet for

1947 of P. Co. giving freehold property at cost less depreciations at under 30,000*l.* whereas the true value was admittedly about 90,000*l.*

Held (reversing the decision of Vaisey J.) (1.) that as the item in the balance sheet did not purport to state the value of the freehold property but only its cost less depreciations, there was nothing in it to mislead the shareholders of P. Co., especially as it was generally known that the value of freehold property had risen greatly during the war; (2.) that another item, patents and goodwill, in the balance sheet given the value of 45,000*l.* was nearly valueless; (3.) that the offer made was very substantially above the market value of the shares; and (4.) that for all these reasons the offer made by M. Co. was not unfair.

The principle laid down by Maugham J. in *In re Hoare & Co.* (1933) 150 L. T. 374, to the effect that on such an application by a dissenting shareholder " it must be affirmatively established " that, notwithstanding the view of a very large majority of " shareholders, the scheme is unfair " approved and applied.

APPEAL from Vaisey J.

Press Caps Ld. had an issued share capital of 17,232, 10 per cent. cumulative participating preference shares of 5*s.* 0*d.* each, fully paid, and 500,000 ordinary shares of 5*s.* 0*d.* each, fully paid. Another limited company called Metal Box Co. Ld. became desirous of acquiring the whole shareholding of Press Caps Ld. and by a document dated December 10, 1947, offered to acquire the preference and ordinary shares. No question arises as to the preference shares but the offer as regards the ordinary shares was as follows: " (2) Ordinary shares. For every hundred fully " paid ordinary shares of 5*s.* 0*d.* each held by the holder " thereof in the undertaking of Press Caps Ld., the Metal " Box Co. Ld. is prepared to allot and issue to such holder " in exchange therefor seven fully paid ordinary shares of " 1*l.* each in the undertaking of the Metal Box Co. Ld. The " exchange of shares in the proportion before mentioned " is based on a value of 7*s.* 0*d.* each for the ordinary shares " of Press Caps Ld., being ninepence above the estimated " market value and a price of 5*l.* each for the ordinary shares " of the Metal Box Co. Ld., the mean market quotation of " which on December 1, 1947, was 5*l.* 5*s.* 0*d.*" It was further stated in the document that the holders of shares of Press Caps Ld. would be entitled to receive and retain all dividends of Press Caps Ld. in respect of the year ended June 30, 1947, declared at the 1947 annual general meeting. There was a form for reply enclosed. Acceptance of this offer was recom-

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mended by the directors of Press Caps Ld. Up to April 10, 1948, that offer was accepted by 95.5 per cent in number of the ordinary shareholders and 96.8 per cent. in value of the shares. In pursuance of the provisions of s. 155 of the Companies Act, 1929 (now s. 209 of the Companies Act, 1948, as modified by sub-s. 6 for the purposes of offers made before the Act came into force on July 1, 1948), the Metal Box Co. Ld. served a notice on the ordinary shareholders of Press Caps Ld. who had not accepted the offer that unless they made some application to the court before May 12, 1948, Metal Box Co. Ld. would be entitled to acquire their shares on the terms of the offer of December 10, 1947. Pursuant to that notice all the ordinary shares of Press Caps Ld. were acquired except 1,000 shares held jointly by the applicants Mr. and Mrs. H. R. Hood-Barrs.

By originating summons dated May 11, 1948, the applicants applied for a declaration that Metal Box Co. Ld. were not entitled to acquire their shares upon the terms of the scheme or contract dated December 10, 1947, notwithstanding that it had been approved by nine-tenths of the shareholders. The chief ground of the application was based on the following item in the balance sheet for 1947 of Press Caps Ld. :

" Freehold property at cost, less depreciation as at July 1, 1946	£29,708	17	0
" Additions during year to date	95	14	0
	29,804	11	0
" *Less* depreciation written off	458	17	6
	£29,345	13	6

The applicant's contention was that this item of freehold property was stated at a gross undervalue, the true value, as was indeed admitted, being about 90,000*l*. It was therefore contended that the offer made by the Metal Box Co. Ld. was unfair and that applicants ought not to be forced to accept it.

In an affidavit made on June 21, 1948, by John Ryan, a director of the Metal Box Co. Ld., it was agreed that the freehold property of Press Caps Ld. was worth more than the balance sheet value. But he said that on the other hand the item " patents and goodwill " given in the balance sheet as 45,113*l*. 5*s*. 0*d*. was really valueless, for at the date of the balance sheet, Press Caps Ld. owned no subsisting patents. When cross-examined on the affidavit he fixed the value of the freehold property at about 90,000*l.* and said that in his view the goodwill of Press Caps Ld. was without value, although that company had made an average profit of 17,000*l.* during the past five years. In support of this he stated that Press Caps Ld. had a manufacturing agreement with Metal Box Co. Ld. which had a very short time to run and the whole future of Press Caps Ld. depended on a renewal of that agreement. Vaisey J. held that the offer was unfair and made the declaration asked for. Metal Box Co. Ld. appealed.

Upjohn K.C. and *T. D. D. Devine* for Metal Box Co. Ld. The offer for the ordinary shares of Press Caps Ld. was very advantageous, for the sale price of Press Caps Ld.'s ordinary shares was 5*s.* 9*d.* while the purchasing price of Metal Box Co. Ld.'s shares was 5*l.* 7*s.* 6*d.* That shows how much better the offer truly was than that shown by reference to mean values. It is admitted that the value of the freehold property was about 90,000*l.* but what was stated in the balance sheet was cost price less depreciation. Almost anybody would realize that the value of freehold property had gone up during the past years and could never be misled into thinking that a sum less than cost price was the true value. It is not an attempt to state the true value. Further the evidence of John Ryan makes it clear that the item of "patents and "goodwill" was valueless, all patents having expired, and the future of Press Caps Ld. being dependent on the renewal of the contract with Metal Box Co. Ld. that was about to expire. That is a matter overlooked by Vaisey J. The Companies Act, 1948, s. 209, states no reason on which a decision in favour of a dissenting shareholder is to be given. The test laid down is whether the offer was unfair: *In re Hoare & Co.* (1); see also Vaisey J.'s decision in *In re Evertite Locknuts* (2). In the present case Vaisey J. was not entitled to write up the value of the freehold property in the balance sheet and decide what was the proper value of Press Caps Ld.'s shares from that. He had departed from the principle laid down by Maugham J. in *In re Hoare & Co.* (1) that a dissenting shareholder must be held to a bargain accepted by nine-tenths of the shareholders unless it is shown to be unfair. Even if the true value of 90,000*l.* is taken into account, there must be deducted the amount of 45,000*l.*

(1) (1933) 150 L. T. 374.

(2) [1945] Ch. 220.

stated to be the value of the patents and goodwill and the result is that the addition to the value of the assets of Press Caps Ld. would be 15,000*l*. The offer for the ordinary shares even when taken at 7*s*. 0*d*. is still a fair offer and, as already pointed out, the true price being given exceeded this. Further the offer was not directed to a purchase of assets but a purchase of shares and the market price is cogent evidence of true value. There is then no evidence whatever that the offer was unfair and the appeal ought to be allowed.

Jennings K.C. and *Hesketh* for the applicants. The success of the applicants does not affect the scheme which still goes through. Further, if shares are intended to be taken compulsorily the court should be jealous to guard the rights of persons whose shares are sought to be taken against their will. A scheme must be supported by very strong evidence in its favour before it can be enforced. It must be remembered that the shareholders are in conditions that make it most difficult to obtain confirmatory evidence either for their own company or for the company making the offer. Further there was a very strong letter from the directors of Press Caps Ld. recommending the acceptance of the offer and yet those directors were to receive shares from Metal Box Co. Ld. of the value of 14,000*l*. or 15,000*l*. and a further 9,000*l*., a matter which well might, though it is not suggested it did, influence them in making the recommendations. It cannot be said that the directors are independent when they stand to benefit to so large an extent. The gravamen of the charge here is that if the shareholders are given the balance sheet and no other information, the shareholders must surely be entitled to rely on the balance sheet as indicating the true position.

[SOMERVELL L.J. They had the market price to indicate the value of the shares they were being asked to part with.]

The market price is an undervalue when a purchase is being made not of a few shares but of the whole shareholding with a view to securing control. Not only did the balance sheet give the freehold property at a third of its value but the auditors in approving the balance sheet said : "No adjustment has "been made to the freehold property account in respect "of damage suffered by enemy action and not yet fully "restored." That tended to suggest that the value in the balance sheet was excessive rather than an underestimate. Unless a dissenting shareholder is to be treated with sympathy by the court, it is very difficult to see how he can make good having regard to his lack of information. Nothing is said in s. 209 of the Companies Act, 1948, or the earlier Act, to the effect that the test is to be whether there is a fair value offered. The words are "unless . . . . the court thinks fit to order "otherwise." It is contended that the court should exercise its discretion in favour of the applicants. The suggestion that Press Caps Ld.'s goodwill is valueless ought not to be accepted in regard to a company which has made good profits and paid good dividends for years. The matter may be debatable one, but it is not one in which this court should interfere with the exercise by Vaisey J. of his absolute discretion.

SOMERVELL L.J. This case turns on an originating summons taken out under s. 209 of the Companies Act, 1948, which deals with and confers a power to acquire shares of shareholders dissenting from a scheme by which one company desires to obtain the transfer to itself of the shares or any class of shares in another company. Although that section applies to offers made before the Companies Act, 1948, was passed, in its application to such offers certain amendments are made by sub-s. 6 which make it read in precisely the same words as s. 155 of the Companies Act, 1929, the section in operation at the time when the offer which we have to consider was made.

I will read the section: "Where a scheme or contract "involving the transfer of shares or any class of shares in "a company (in this section referred to as 'the transferor "'company') to another company, whether a company "within the meaning of this Act or not (in this section referred "to as 'the transferee company'), has, within four months "after the making of the offer in that behalf by the transferee company been approved by the holders of not less "than nine-tenths in value of the shares affected, the "transferee company may, at any time within two months "after the expiration of the said four months, give notice "in the prescribed manner to any dissenting shareholder "that it desires to acquire his shares, and when such a notice "is given the transferee company shall, unless on an "application made by the dissenting shareholder within one "month from the date on which the notice was given the "court thinks fit to order otherwise, be entitled and bound "to acquire those shares on the terms on which, under the "scheme or contract, the shares of the approving shareholders "are to be transferred to the transferee company." That, I think, is all I need read. [His Lordship then stated the facts of the present case and continued :]

I will refer to the case in which the broad general principle was laid down which neither side disputed ; it is a case decided by Maugham J. in *In re Hoare & Co.* (1), where there was an application of a similar kind in respect of a scheme. In the course of his judgment, Maugham J. referred to the fact that the application came before him, as an application of this kind can only come before the court, when 90 per cent. or more of the shareholders had accepted the offer and he said : "Accordingly, without expressing a final opinion on the "matter, because there may be special circumstances in "special cases, I am unable to see that I have any right to "order otherwise in such a case as I have before me, unless "it is affirmatively established that, notwithstanding the "views of a very large majority of shareholders, the scheme "is unfair." Speaking for myself, I accept that criterion. I therefore turn to the reasons which are submitted on behalf of the applicants for saying that the offer here is unfair. The main point made, and the main point dealt with by the learned judge, is based on the balance sheet. The balance sheet of 1947 has this item : "Freehold property—at cost, less "depreciation, as at July 1, 1946, 29,708*l.* 17*s.* 0*d.*" Then there is a small addition during the year and a sum of 458*l.* written off with the result that 29,349*l.* 13*s.* 6*d.* appears as the freehold property at cost, less depreciation. It is common ground that the value of that freehold property was a very much larger figure. Mr. Ryan, who was a director of the transferee company before the offer was made and substantially accepted and has, since the rearrangement, become a director of Press Caps Ld. as well, gave evidence and he admitted—when cross-examined on his affidavit—that the value of that freehold property was in the neighbourhood of 90,000*l.* As I read the learned judge's judgment, it was on that ground that he made an order in favour of the applicants and where I differ from the learned judge is that I cannot accept his view of the inference to be drawn from the entry in the balance sheet. He describes it, and I think this is the key to the difference between my and his view. He says : "If you "find admitted so large a discrepancy as an under-valuation

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(1) 150 L. T. 374.

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"of the most important asset, I should have thought, in the "balance sheet of this company, an admitted under-valuation "of no less than 60,000*l.*, I should have thought that that "threw a great deal of doubt on the appropriateness of the "balance sheet as an estimate of value, and through that, "therefore, it also threw doubt on the market prices of the "shares." With respect, I cannot myself regard this figure in the balance sheet as a valuation. It does not purport to be. If, in making this offer, the Metal Box Co. Ld. had said: "The freehold property of this company is worth "to-day 30,000*l.*" all the strictures that the learned judge makes and all the conclusions which he draws would, I think, have had the greatest possible force: but this figure, in accordance with what is very common practice, does not appear in the balance sheet as a valuation of the property as at the date of the balance sheet, but as its cost less depreciation. Therefore, it does not seem to me that there is anything misleading about it. I would be surprised if in a great many balance sheets to-day freehold property did not appear in some such form as this and not with the increased value, in spite of the fact that there has been a very substantial rise, as everybody knows, in the value of freehold property of nearly every kind.

That being so, the reasons which led the learned judge to the conclusion that he formed really go. It was said that certain expressions in his judgment suggested that he was applying what I may call a subjective test rather than an objective test; that is to say, were the dissenting shareholders being reasonable, or acting on a reasonable ground, in not wanting their shares purchased? The learned judge referred to the decision of Maugham J., and indeed set out the principle then laid down in his judgment, I do not think that the words relied on by him could really be taken out of the general setting of his judgment and repeated as the principle which he applied. I am strengthened in that view by a sentence from his own judgment in *In re Evertite Locknuts Ld.* (1), to which he himself referred. Towards the end of that judgment he said: "At the same time, it seems to me that "if I were to accede to this present application, the whole "matter would be left in a condition of quite intolerable "uncertainty, and that it cannot be right that one shareholder, "owning one-seven-hundredth part of the shares affected,

(1) [1945] Ch. 220, 224.

"should be entitled to stand out against the decision of the "699/700ths of the share capital, merely because he has, "as he thinks, been left somewhat in the dark in regard to "the material facts."

In addition to the point to which I have referred, Mr. Upjohn relied on some other matters. He said, and there was evidence that supported it, that the price in fact paid for the ordinary shares of Press Caps Ld. was really more favourable, having regard to the Stock Exchange prices, than appeared in the offer. The offer referred to mean prices, whereas a person seeking to sell a share in the transferor company at the time of the offer would get 5*s.* 9*d.* only. Therefore the 7*s.* 0*d.* offered was 1*s.* 3*d.* above the selling price; and, with regard to the Metal Box Co. Ld., five guineas again was the mean price, and a person seeking to buy a share in the Metal Box Co. Ld. at that time would have had to pay 5*l.* 7*s.* 6*d.* He also relied on the evidence of Mr. Ryan. Mr. Ryan said that the figure for patents and goodwill was an over-valuation, because, he stated, the patents had run out and the position, at any rate as regards a considerable part of the business of Press Caps Ld., was that they were marketing articles manufactured for them by the Metal Box Co. Ld. under a contract shortly running out, and depending for its renewal on the directors of Metal Box Co. Ld. He also relied on the fact that the directors of Press Caps Ld., who at that time had no common director with Metal Box Co. Ld., sent a letter which was enclosed with the offer in which they said: "Your directors have "very carefully considered the offer and they are unanimous "in their strong recommendation for its acceptance"; and they gave certain reasons which I need not trouble to repeat. No doubt is, or could possibly be, thrown upon the bona fides of that recommendation. Mr. Jennings pointed out, quite rightly, that, as appears from the last paragraph of the document, the directors were getting compensation, some of which had been agreed and some of which was left outstanding. That is a perfectly proper matter to draw attention to, but I think Mr. Upjohn is entitled to rely on their recommendation as supporting the view that this was a fair offer.

On those matters, therefore, the onus, as I think, being on the applicants, they have not, by the evidence and the matters referred to, satisfied me that this offer was not a fair offer. I say that assuming that it has got to be fair to each individual shareholder of small or moderately small parcels of shares. There is no evidence here that any one shareholder held a controlling interest.

Mr. Jennings submitted that to rely on the Stock Exchange valuation was wrong, because s. 209 refers to a scheme or contract in the singular. He said it contemplated a transaction other than that which would normally take place, namely a transaction in which the shareholders as a body (no one, I think, on this argument, having a controlling interest) were entitled to receive their proportions of what it might be assumed a purchaser would give for getting a controlling interest. I cannot myself see anything in the section which justifies that submission, but it is unnecessary to decide that point, because, assuming such a construction is possible, I am satisfied here that, having regard to the amount—I think some 25 per cent. or thereabouts—by which the sum offered was above the Stock Exchange relative buying and selling values, Mr. Jennings on behalf of his client has failed to discharge the onus of showing that the offer was unfair, even on that assumed construction of the Act. There was, of course, no evidence which would enable the court to put any figure on what extra amount, in the case of a company of this kind in the condition in which it was, would have been given by somebody getting control. If the contract to which Mr. Ryan referred was an important part of their business and was just running out, it might be very difficult to find anybody who would be willing to purchase a controlling interest. Mr. Jennings' second submission was that in a case of this sort information of a full kind should be given to the shareholders, or, anyhow, fuller kind than was given in this case. I do not myself think that that submission helps him, partly perhaps on account of the way in which I regard the item against which most complaint was directed. It seems to me that if in the year 1947 someone sees a freehold property valued at cost, that is the plainest possible indication, unless there are some exceptional circumstances, that it will be worth in the market more than the figure that appears in the balance sheet, and if any of the people who received this offer were interested in following up this matter, or any stockbrokers whose advice they may have sought, a perusal of back balance sheets would show when the property was bought and what it cost. The broad relation between that figure and its valuation to-day would then have been readily apprehended. Then Mr. Jennings finally took the point that this is a matter of discretion and that we ought not to interfere with the learned judge's exercise of his discretion. That is an important consideration, but I think that this is a case in which it is right to come to a different conclusion, because I take a different view of the facts and the evidence on affidavit put before the court by the applicant. It is true there was the oral evidence of Mr. Ryan, but on that there is no difference and the learned judge did not refer to it in any detail, but on the documents that have been put forward, I have come to the conclusion that they do not justify a conclusion that the offer was unfair.

For those reasons, I think it is right that this court should allow the appeal and make the appropriate order on that basis.

EVERSHED L.J. I agree. This is a case in which an offer was made, pursuant to what is now s. 209 of the Act of 1948, to acquire 500,000 ordinary shares at 5*s.* 0*d.* from 1,116 holders. It is, of course, of the first importance to note that of that 1,116, 1,114 have by now regarded the offer as one which they could fairly and properly accept. Two joint-holders have held out. In those circumstances, I regard as the appropriate guide to providing the answer to the application the language of Maugham J. which my brother has already read. In the light of that language, I first of all fail here to find any special circumstances such as the learned judge had, I think, in mind, with the result that, in my judgment, the onus upon the applicant is a heavy one. But Mr. Jennings has said that it is in the end a matter for the discretion of the learned judge and that we ought not to disturb its exercise by him. With the greatest respect to the learned judge, I do not think in this case that is a satisfactory answer, for I think that the learned judge took a view which was not really justified on one particular matter in evidence, namely, the figure appearing in Press Caps Ld.'s last balance sheet as representing cost plus additions, less depreciation, of the freehold property. On the evidence it appeared that the property in fact is worth some three times the sum so arrived at in the balance sheet. I agree with what Somervell L.J. has said, namely, that the figure in the balance sheet does not purport to be a valuation. I think, with all respect to him, the learned judge really misdirected himself by regarding it as being a valuation which was put to the shareholders as a relevant matter of fact for their consideration in determining whether or no to accept the offer. He was therefore led to conclude that that figure represented (and I use his own words) a gross under-valuation of the most important asset in the Press Cap undertaking. Of course, one can well understand that if a contract is procured by some gross under-valuation on a material matter represented to the offeree, the court would be likely enough to say: "This contract is not one which I "will enforce upon an unwilling seller," but without repeating what has fallen from Somervell L.J., I venture to think that is not the right approach to this particular case. Indeed, Mr. Jennings has somewhat shifted his ground before this court, and the main burden of his argument has been that to have taken as the basis of the offer the Stock Exchange valuations of the shares in the respective companies was, on the face of it, unfair because the offer in this case is one in which the offer being made is to acquire the entire shareholding of the transferor company. All the shareholders in that company are being invited to join together in transferring to the transferee company the entire issued share capital and with it the control of the transferor company. It is said the Stock Exchange valuation neglects the element of control, so that it is not a fair approach or a fair basis for the offer.

For my part, I would prefer to express no view whether in cases of this kind it is right that this element of control should be taken into account in making the offer, because it seems to me that in this case the contention is answered in two ways; first, by the fact that 1,114 shareholders out of 1,116 have accepted the offer. Prima facie then we should take the offer as fair for, to borrow the language of Maugham J., the court ought not to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned; secondly, as already stated by my brother, the price offered does in fact give a substantial addition to the price which would be arrived at by a simple calculation on Stock Exchange bases. I therefore think that Mr. Jennings, assuming in his favour that his premise is correct, fails to discharge the onus laid upon him of showing that this scheme is not fair, and this court accordingly ought "to order otherwise" within the terms of the section.

I add one other point, rather at Mr. Jennings' invitation. He invited the court to impose a greater stringency in the matter of disclosure on companies when objectors, such as his clients in the present case, apply under the present section. The question of disclosure of documents is not one which is directly raised in this case and I do not think it would be right for me or for the court in the present circumstances to express any view on that matter. I am satisfied that there is no such absence of disclosure in the present case as would justify the court in saying that Mr. Jennings has discharged the onus of showing the scheme unfair.

For those reasons, as well as those given by Somervell L.J., I venture to think the learned judge was in error in this case, and I would therefore allow the appeal.

WYNN-PARRY J. I agree. I think, with respect, that Maugham J. stated the correct test in *In re Hoare & Co.* (1), namely, that where the statutory majority have accepted the offer, the onus must rest on an applicant to satisfy the court that the price offered is unfair. He says: "The other "conclusion I draw is this, that again prima facie the court "ought to regard the scheme as a fair one inasmuch as it "seems to me impossible to suppose that the court, in the "absence of very strong grounds, is to be entitled to set up "its own view of the fairness of the scheme in opposition "to so very large a majority of the shareholders who are "concerned. Accordingly, without expressing a final opinion "on the matter, because there may be special circumstances "in special cases, I am unable to see that I have any right "to order otherwise in such a case as I have before me, unless "it is affirmatively established that, notwithstanding the views "of a very large majority of the shareholders, the scheme "is unfair."

Vaisey J. accepted this test. In discussing the argument of Mr. Divine, the learned judge said: "He says that the "applicants have not discharged the onus which I think "rests upon them to show some reason why they should "not be compelled to come into this sale and purchase"; but, with all respect, in my view the learned judge failed to apply the test. He goes on to say: "I think all I have "to be satisfied is that there is a reasonable ground to suppose "that these shares are being taken over at less than what "the shareholder, at any rate, thinks is their proper price, "and I have further, I think, to make up my mind that the

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"shareholder's belief in the inadequacy of the price is one "which is not a mere matter of doubt or speculation but "is based upon some reason and some intelligible ground." It is true that later he says: "I think all I should say is "I take the view here that there was an inadequacy of price, "which may be quite small, but, in my judgment, is not "really a trifle," but again that is linked up with his view that the real test is what the shareholder says, because he continues and refers to something which justifies this shareholder in saying: "I will not be coerced. I will not have "my shares expropriated. I will stand where I am. I know "more about this property and the value of it than the other "shareholders who have walked into this scheme like a flock "of sheep."

In my view, he is substituting the view of a shareholder for the view of the court. A valuation is only an expression of opinion. It may be made on one of a number of bases, but the final test of what is the value of a thing is what it will fetch if sold. In some cases a sale has to be made, as one knows who exercises the administrative jurisdiction of the Chancery Division, but if there exists a market, as, for instance, the Stock Exchange in the case of shares, in respect of which there is a quotation or in respect of which there is permission to deal, there may be no need to sell, and prima facie the Stock Exchange markings can be taken as a satisfactory indication of the value of the shares in question. For that reason alone it appears to me, with respect, that Lord Maugham's view as to where the onus lies under the section is justified. It therefore follows that to succeed the applicants must go behind the Stock Exchange markings, and this undoubtedly is a heavy onus.

The attack here is that the balance sheet does not represent the true position. The learned judge seems to treat the balance sheet as containing a valuation of the freehold property. I do not so read it. The legend in the balance sheet does no more than accurately represent the state of the freehold property account in the books of the company. It is no more a valuation than the items. "Patents and goodwill—at "cost less amounts written off—as at July 1, 1946, "45,113*l.* 5*s.* 0*d.*" The evidence on that item satisfies me that there is ground for saying that that asset was not, at the date of the balance sheet, worth anything, or at any rate anything like 45,000*l.* The result, therefore, is that if one

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has to write up the one item, one must write down the other. Thus it seems to me that when one regards the balance sheet in the light of the evidence, it affords the applicants no sufficient ground for saying that they have discharged the onus which lies on them.

It was urged by Mr. Jennings that Vaisey J. had exercised his discretion and that we should not interfere with that exercise; but, in my view, the learned judge misdirected himself because he treated the balance sheet as containing a valuation of the freehold property and, with all respect to him, I think that his whole judgment is coloured by this. In my view, the applicants have failed to discharge the admittedly heavy onus which lies on them. As regards Mr. Jennings' argument on the question of control, I agree with what has been said by Somervell L.J. and I do not desire to add anything on that point.

For these reasons, I agree that the appeal should be allowed.

Appeal allowed.
No order as to costs of appeal or below.

Solicitors: *Reynolds, Gorst & Porter; Tyrrell, Lewis & Co.*

H. C. G.

Affirmed. C.A. [1949] 2 All E.R. 913.

Affirmed. Whiteside *v.* Whiteside [1950] 1 Ch. 65

HARMAN J.
1949
Mar. 11.

WHITESIDE *v.* WHITESIDE AND OTHERS.

Rectification—Deed of Covenant—Payment to be "free of tax"—Mistake of Law—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40) *General Rules, r.* 23, *sub-r.* 2.

The plaintiff executed a deed in favour of the first defendant (his former wife) whereby he covenanted that he would pay to her "the sum of 1,000*l.* per annum free of British income tax "up to but not exceeding 7*s.* 6*d.*" His intention was that the first defendant should receive a net payment of 1,000*l.* after income tax up to the stated rate had been deducted. At first the Commissioners of Inland Revenue allowed a deduction from the plaintiff's sur-tax on the footing that he was legally liable to pay on this basis, but after two years they refused to allow the deduction and the plaintiff then commenced an action for rectification of the deed

[Reported by Miss E. Dangerfield, Barrister-at-Law.]

by substituting the words "such an annual sum as after deduction "of British income tax at the rate of 7*s*. 6*d*. in the *l*. will leave "1,000*l*." for the words "the sum of 1,000*l*. per annum free of "British income tax up to but not exceeding 7*s*. 6*d*." While this action was pending the plaintiff executed a supplemental deed which incorporated the proposed rectification so that as between the parties, the plaintiff became legally bound to pay the full amount as from the date of execution of the supplemental deed.

Held, that the court would not exercise its jurisdiction to rectify merely to enable the plaintiff to obtain a deduction from his income tax. There was nothing to put right between the parties because the supplemental deed gave the defendant all that she would have received if rectification of the original deed had been granted.

Van der Linde v. *Van der Linde* [1947] Ch. 306 referred to.

Rectification could not be granted where the parties intended to make the very contract which they in fact made, even if they did not appreciate its legal effect.

Hatch v. *Hatch* [1919] 1 Ch. 351; *Stone* v. *Godfrey* (1854) 5 De G. M. and G. 76; *Burroughes* v. *Abbott* [1922] 1 Ch. 86; *Jervis* v. *Howle and Talke Colliery Co. Ld.* [1937] Ch. 67; *Fredensen* v. *Rothschild* [1941] 1 All E. R. 430; and *Jackson* v. *Stopford* [1923] 2 I. R. 1. referred to.

WITNESS ACTION.

The plaintiff and the first defendant were married in 1919. The marriage was dissolved on October 14, 1940. Before the hearing of the divorce proceedings the parties and their solicitors had discussed alimony and maintenance of the wife and children but had not reached agreement when the decree was made absolute. Negotiations were continued after the dissolution of the marriage and in a letter of February 4, 1941, the solicitors acting for the wife set out the terms with which she would be satisfied: "In substance, the proposals you made are accepted, but we set out the terms according to our "instructions in the following way . . . . (3.) Payment to "Mrs. Whiteside of 1,000*l*. per annum free of tax up to the rate "of tax in the *l*. payable as at the date of the deed of covenant "to be entered into between the parties for the permanent "maintenance of Mrs. Whiteside and her two children and "this during her lifetime . . . . (6.) The terms when agreed "to be wholly incorporated in a deed of covenant the provisions "thereof to be secured both as to maintenance and otherwise "by deposit of a sufficient block of shares." These terms were not accepted and the plaintiff wrote to his solicitors on February 11, 1941, saying: "My offer of 1,000*l*. annuity free "of tax up to 7*s*. 6*d*. in the *l*. stands. I am not interested "in their suggestion 'free of tax up to the rate as at the date "'of the covenant'." After this there was an interview between the solicitors acting for the parties and, so far as they had authority to do so, they agreed that the wife should receive annually "1,000*l.* clear of tax up to 7*s.* 6*d.*" This agreement was subject to confirmation by the wife who was then resident in Canada. She confirmed the agreement and her solicitor proceeded to draw the deed of covenant contemplated between the parties. The draft recited: "It "has been agreed between the parties hereto that the husband "and his personal representatives shall pay to the wife during "her life for the maintenance of herself and the said children "such a sum as after deduction of tax at the rate of not more "than 7*s.* 6*d.* in the *l.* shall amount to 1,000*l.* per annum." In cl. 1 (1.) of the draft of the operative part, the husband was expressed to covenant in these terms: "During the life "of the wife pay to the wife such a sum after deduction of "income tax at the rate of not more than 7*s.* 6*d.* in the *l.* as "shall represent 1,000*l.* per annum payable in advance," and so forth. The plaintiff's solicitor amended the recital in the draft deed to read: "The husband and his personal representatives shall pay to the wife during her life for the "maintenance of herself and the said children the sum of "1,000*l.* per annum free of British income tax up to but not "exceeding 7*s.* 6*d.* in the *l.* payable in advance" and the operative clause to read "During the life of the wife . . . . to "pay to the wife for her maintenance the sum of 1,000*l.* per "annum free of British income tax up to but not exceeding "7*s.* 6*d.* in the *l.* payable in advance," and so forth. The plaintiff's solicitor stated in evidence that he made these alterations because this was a divorce matter and he thought that the deed should follow the usual wording of orders in the Divorce Court. The amendments were accepted by the wife's solicitor under the impression, as he said, that he had not altered the rights of his client. The deed was executed in that form on April 16, 1942, both sides believing that it provided for a net payment of 1,000*l.* after deduction of income tax up to the stated rate.

Pursuant to the deed, the plaintiff paid to his former wife a net sum of 1,000*l.* each year and for the first two years the payment was admitted by the Commissioners of Inland Revenue as a legal liability in reduction of his sur-tax. The present action was commenced against the wife and the trustees of the deed after the Commissioners of Inland Revenue had refused to allow the deduction of the payment because it contravened r. 23, sub-r. 2, of the General Rules made under the Income Tax Act, 1918 (1). The plaintiff claimed rectification of the deed so as to make the clause relating to the payment read: "such an annual sum as after deduction of "British income tax at the rate of 7*s.* 6*d.* in the *l.* will leave "1,000*l.*"

While this action was pending he continued to pay the full amount to the wife and on March 30, 1948, he executed a supplemental deed by which he agreed that the deed of April 16, 1942, should be treated as rectified and as having always read in the terms in which rectification was now asked.

Honeyman for the plaintiff. The intention of the parties was clear. The mistake was made by their solicitors who did not appreciate the effect which the General Rules had on the words used by them in the deed of covenant. This was a mistake of law: *Hatch* v. *Hatch* (2). The court has, however, jurisdiction to grant rectification of a mistake of law. He referred to *Stone* v. *Godfrey* (3); *Burroughes* v. *Abbott* (4); *Jervis* v. *Howle and Talke Colliery Co. Ld.* (5); and *Van der Linde* v. *Van der Linde* (6). In *Jackson* v. *Stopford* (7) there was a similar mistake of law as to the effect of an Irish statute but it may well have been right to refuse rectification in that case because no form of words which the parties could have used would have avoided the statute and so achieved their intention.

Newsom for the first defendant.

Colinvaux for the trustee.

HARMAN J. This is a case of some difficulty. The plaintiff sues his former wife and the trustees of a deed of covenant dated April 16, 1942, for rectification of that deed. When the matter came before me both the wife and the trustees had put in defences admitting all the allegations in the statement of claim. By my direction the trustees have withdrawn their defence and have substituted for it a defence that, while admitting the execution of the deed, they do not admit the other allegations in the statement of claim. They put the plaintiff to the proof of his case and in effect, by their counsel submitted to such directions as the court should give, and they have, by my direction, through their counsel, asked proper questions in cross-examination of the witnesses produced on behalf of the plaintiff. [His Lordship then stated the facts and continued :] The only object in the action is to obtain for the husband a weapon with which he can defend himself from the claims of the Commissioners of Inland Revenue or make claims against them. The prayer to the statement of claim is in these terms : " Rectification of the said deed " of covenant by substituting in the fifth recital thereof and " in cl. 1 (1.) thereof the words ' such an annual sum as after " ' deduction of British income tax at a rate up to but not " exceeding 7*s*. 6*d*. in the *l*. will leave the sum of 1,000*l*. per " ' annum ' for the words ' the sum of 1,000*l*. per annum free " ' of British income tax up to but not exceeding 7*s*. 6*d*. in " ' the *l*.' "

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(1) By r. 23 of the General Rules applicable to Scheds. A, B, C, D and E of the Income Tax Act, 1918: (1.) "A person who "refuses to allow a deduction of "tax authorized by this Act to "be made out of any payment, "shall forfeit the sum of fifty "pounds"; (2.) "Every agreement for payment of interest, "rent or other annual payment "in full without allowing any "such deduction shall be void."

(2) [1919] 1 Ch. 351.

(3) (1854) 5 De G. M. and G. 76.

(4) [1922] 1 Ch. 86.

(5) [1937] Ch. 67.

(6) [1947] Ch. 306.

(7) [1923] 2 I. R. 1.

It was appreciated, I think, that the objection might be taken that the Crown was the only person concerned in this case beyond the plaintiff and, therefore, apparently the Crown was communicated with to ascertain whether it wished to be joined as a party, and the Crown intimated that it did not wish to be so joined and the matter comes before me and the plaintiff asks for rectification in those circumstances.

A very similar set of circumstances existed in the case of *Van der Linde* v. *Van der Linde* (1), before Evershed J. There the case was one of a voluntary deed of covenant by a settlor in favour of his sister. It was said that it was intended it should be a tax free provision for her. He had always paid her tax free and continued to do so, but in order to better his position vis-à-vis the Commissioners of Inland Revenue he brought the action. According to the headnote it was held that as the proposed rectification was not one which would benefit the parties inter se, it being merely proved that, through a mistake the intention of the settlor to obtain some benefit from the income tax provisions had not been set out in the deed of covenant, the court would not exercise its jurisdiction to rectify the deed. In that case the Crown was amicus curiæ in opposition to the claim. I take leave to doubt whether the case, when you look at it, justifies that headnote; that is not what the learned judge decided. In fact he decided that he was not satisfied on the evidence that there was any common mistake or that rectification could be had and, therefore, the claim failed on the facts, but the learned judge in the course of his observations did make some observations which are extremely pertinent to what I have here to decide. He says this (1): "It is a deed of covenant inter partes executed, "however, only by the plaintiff. Having regard to the form "of the deed, it is plain that the plaintiff was not entitled, "as between himself and the taxing authority, to claim relief, "or deduction from liability, on the footing of an obligation "to pay, with income tax at 10s. in the *l.* a gross sum of "800*l.* From the time that that circumstance was discovered "it was, of course, a simple matter to remedy the defect "by means of some amendment of the original deed, or the "execution of a new one, assuming always that there was no objection raised on the part of the covenantee." Of the beneficiary he says: "Certainly she was in no way "affected as regards the benefaction she received on its "coming into existence and therefore could throw no light "whatever on the matter which has been litigated. But the "execution of the amendment, or deed of rectification, has, "of course, not had the effect of making the amendments "retrospective so as to entitle the plaintiff, from the date "of the execution of the original deed, October 8, 1942, to "the tax relief which he sought. On those facts it is said "on behalf of the plaintiff that what he intended to effect "has been proved," and so on. Then "It is said on behalf "of the Crown that there is no desire to take advantage of a "mistake, though it must also be borne in mind that, since "the question is one of the tax obligation of one subject, "anything like unregulated benevolence towards him would "be at the expense of other subjects. The Crown also points "out that, whether or not the discretion should in any case "be exercised, it is quite plain that the rectification of "documents is a remedy which these courts grant only on "most careful consideration of the circumstances sought to "justify the claim." Then he considered a question about

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(1) [1947] Ch. 306.

(1) [1947] Ch. 310, 311.

voluntary deeds which I need not consider and continued: "Further it is said on the Crown's behalf that, where on the "facts it is shown that there never was any obstacle as between "the two parties to the deed to put right any mistake, it "would not be a case in which on any view the court should "exercise its discretion, more particularly where the object "is on the plaintiff's part to obtain, so to speak, by a side "wind an advantage which he could have obtained and which "he only lost through the error which was made. On the view "that I take of it, it is not necessary, and I do not think, "therefore, probably desirable, that I should express any "concluded view on those propositions .... But in the case of "such a deed, and all the more particularly when the object "is to obtain by a side wind some advantage to the settlor "without any regard to the apparent intention on the face "of the deed and to the fact that the covenantee has never "suffered any damage from what is said to have gone wrong, "I am satisfied that the reminders one finds in the text books "to approach matters with caution are to be particularly "borne in mind."

With every word of that I agree and it seems to me that this is a case in which I ought not to grant the plaintiff rectification. The action is not an action to put right anything which needs putting right. That has been done already. The covenantee has already received on any view, all that she is entitled to. The covenantor has not, in any way, failed to pay it. There is no relief that the parties require. What is wanted is a side wind to help the plaintiff against the Commissioners of Inland Revenue. I do not think in those circumstances the court ought to exercise its discretionary remedy of rectification, and on that ground alone I should be disposed to dismiss this case. But it may be thought elsewhere that that is a wrong view to take so I think it is incumbent on me to consider whether apart from that the plaintiff here makes out his case.

This is a very striking case in this way, that the very words which I am now asked to put into the deed by way of rectification were considered by the parties when the matter was in negotiation and deliberately and with set purpose rejected; the amended draft shows that the parties deliberately intended to contract in the very words which they used. The prior agreement, so to call it (although a prior agreement in a binding sense is not necessary for rectification), was that

Mrs. Whiteside should be paid maintenance of 1,000*l*. a year free of tax up to 7*s*. 6*d*., and those are the very words you find in the deed; and when you find that, in the interim between the agreement and the execution of the deed, one side has suggested that another form of words should be used which have in law a different effect and those words have been deliberately rejected by the consent of the parties, then it seems to me, if you are to rectify it must be on a principle different from any I have heard of in connexion with rectification. I take the law to be correctly stated in Kerr on Fraud and Mistake, 6th ed., at p. 620: "Though "the court will rectify an instrument which fails through "some mistake of the draftsman in point of law to carry "out the real agreement between the parties, it is not sufficient "in order to create an equity for rectification that there has "been a mistake as to the legal construction or the legal "consequences of an instrument." Moreover, the parties here have proved that they meant to make the very contract which they have made, but they say they did not appreciate what the legal consequences would be—"therefore, rectify "our mistake of law." I do not take the view that that is a legitimate kind of rectification. The matter or something like it has been considered in a number of cases. To go back to the beginning, one finds a statement by that great authority Turner L.J. in *Stone* v. *Godfrey* (1): "I assume . . . . that "this court has power (as I feel no doubt that it has) to "relieve against mistakes in law, as well as against mistakes "in fact." The mistake in law there was a different matter. There the plaintiff had been advised that he was not entitled to an estate by the courtesy, and acting on that advice obtained the estate for his daughter. He came to the court and said he had been wrongly advised and wanted rectification. But even so, if he had got it, that would not be the kind of mistake you have here.

It was argued that the present deed could be rectified because of two decisions. First is that of P. O. Lawrence J. in *Burroughes* v. *Abbott* (2). There the Divorce Court made an order that the wife was to have a sum of money free of income tax. When the conveyancer to the court came to translate that into a deed he put it in the form which offended r. 23, and what was asked was that there should be rectification so as to make the deed conform with the order. There was

(1) 5 De G. M. and G. 76, 90. (2) [1922] 1 Ch. 86, 95.

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no preceding contract in that case; it was not a case of rectification in the ordinary sense. Lawrence J. was confronted with the objection that a mistake of law could not be rectified and he says this: " Then it is said that the mistake made by " the parties was a mistake in law and that the court has no " power to relieve against the consequences of mistakes in " law. In my judgment the general proposition that the " court has no such power is unsound (see *Stone* v. *Godfrey* (1)) " but, be that as it may, the proposition in my opinion has " no application to the facts of this case." I do not disagree with any part of that. What he was doing was to make the document framed by the court conveyancer conform with the Divorce Court order. Significantly, during the course of the case the only hesitation was whether the Divorce Court should make the rectification or the Chancery Division.

Later there was the case of *Jervis* v. *Howle & Talke Colliery Co., Ld.*, before Clauson J. (2). In that case there was an oral agreement between the parties that the defendant should take a lease of the plaintiff's coal mine at a royalty of 3*d*. a ton free of tax. There was a memorandum of that agreement containing the words " free of tax "; there was a lease which translated those words literally into a covenant to pay royalty free of tax, and the plaintiff claimed rectification by substituting for the payment of royalty " free of tax " provision for " payment of royalty of such amount as after " deduction of income tax at the standard rate from time " to time should leave threepence." The difference between that case and this may not be very wide. It is, I think, really significant that it was said by Clauson J. that *Burroughes* v. *Abbott* (3) was a case precisely in point. I am very diffident about differing from that learned judge, for whom I have a great veneration, but it does not seem to me that that is right. He says that the judgment of the Divorce Court in *Burroughes* v. *Abbott* (3) played exactly the part played by the memorandum in the case before him. One was however a consensual document and the other was an order in invitum and that seems to be a matter which the judge overlooked.

However that may be, the learned judge had not before him the extraordinary feature I have here; that the parties have rejected the very words they now ask that I should supply. I do not think that that case binds me or enables me to say that in every case where " free of tax " comes into it, rectification may be granted upon proof of mistake, and in that connexion the observations of Bennett J. in the case of *Fredensen* v. *Rothschild* (1) are significant. That was a case where a lady brought an action for rectification of a deed of covenant on the ground that the terms had been that she was to have 550*l.* free of tax and that meant such a sum as after deduction of tax should leave her 550*l.* In fact she did not satisfy the learned judge about her recollection whether or not the word " tax " was ever used. Bennett J. goes on like this: " However, supposing that that conclusion of fact " which has been reached is not the right one, and that the " word ' tax ' was used. The high-water mark of the case " of counsel for the plaintiff is that I ought to find it proved " as a fact that Lord Rothschild said to her ' You are to have " ' 550*l.* free of tax.' Take those words ' 550*l.* free of tax.' " What do they mean ? Do they mean that there is agreement " as to the words which are to be used to give effect to the " bargain they have made ? Counsel for the plaintiff agrees " that, if those words had been put into a deed, they would " not have had the effect of freeing the plaintiff from liability " to income tax and of throwing the burden of the income " tax upon the shoulders of Rothschild. He says, however, " that it has been settled by two authorities. One was a " decision of Clauson J. in *Jervis* v. *Howle & Talke Colliery Co.,* " *Ld.* (2) and the other, *Burroughes* v. *Abbott* (3). These " cases decided that, if parties have agreed that a sum shall " be paid free of tax, they do not mean what they have said, " but they mean payment of such a sum as, after deduction " of tax, will produce the specified sum. I am troubled " about this very largely because I have had the pleasure " and advantage of reading a most delightful and entertaining " lecture by MacKinnon L.J. which he calls : ' Accurate and " ' clear expression '." At the conclusion he says : " You " may sometimes hear people who have made, or think they " have made, an agreement, talk about ' getting it put into " ' legal form.' Rightly understanding, they ought to mean " ' getting it expressed in perfectly clear language.' And if " their own amateur effort is in truth a real agreement, no " further process is necessary. What usually is necessary

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(1) 5 De G. M. and G. 76.

(2) [1937] Ch. 67.

(3) [1922] 1 Ch. 86.

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(1) [1941] 1 All E. R. 430, 436.
(2) [1937] Ch. 67.
(3) [1922] 1 Ch. 86.

"is to help them to make, not merely to express, an agreement." Bennett J. then points out that he has great doubt what exactly the words "free of tax" do mean. I am visited by the same troubles as was Bennett J. was on that score.

My view of the impropriety of rectifying in these circumstances is supported by an Irish case, *Jackson* v. *Stopford* (1). That was a case about a lease and it arose out of an Irish statute which prohibited payment by landlords of certain poor rates assessed on occupiers. It was held: "By the High Court "of Appeal, affirming the decision of the Court of Appeal "in Southern Ireland and the judgment of Gordon J., that "the court cannot rectify or cancel a deed or agreement "because its terms operate differently from what the parties "intended owing to their mistake as to the general law "applicable to the transaction." The decision is by the Supreme Court then representing both North and South Ireland and is one of considerable weight though, of course, not binding on me. The point was that if you literally translated the actual agreement made into the deed you would not produce the effect the parties said it ought to have produced. What they had agreed was not in doubt; they had made no mistake except as to the legal effect of their agreement. I need not refer to the case in detail.

I do not think this is a case in which even if I were otherwise disposed, which I am not, I can assist the plaintiff: he has not satisfied the necessary conditions. All he proves is that an agreement was made which both parties intended. It has turned out to have a different legal effect from that which was anticipated, but that is no ground for rectification, and I therefore dismiss the action.

Action dismissed.

Solicitors: *Joynson-Hicks and Co.; Kimber Bull and Co.*

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(1) [1923] 2 I. R. 1.

In re ST. LUKE'S HOSPITAL, CHELSEA, LONDON.

C. A.

1949

Mar 31 ; *Apr.* 1, 12.

Somervell and Evershed L.JJ. and Wynn-Parry J.

Emergency legislation—War damage—Temporary works payment—Operating theatre and other offices of hospital destroyed—Operating theatre and offices constructed in undamaged part of hospital—Not " works reasonably executed for temporarily meeting the circumstances " created by the damage "—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 6, *sub-s.* 2.

The central building of a hospital, which contained its operating theatre, main kitchen and X-ray room, was destroyed by a high explosive bomb in 1941. To enable the hospital to function, an operating theatre, kitchen and X-ray room and other offices were constructed, not on their former corresponding sites, but in undamaged parts of the hospital. These works it was calculated would have a life of from forty to fifty years. The War Damage Commission determined that these works were not " works reasonably executed for temporarily meeting the " circumstances created by the damage " within s. 6, sub-s. 2, of the War Damage Act, 1943, and accordingly the London County Council, as the owners of the hospital, were not entitled to a temporary works payment in respect thereof. Vaisey J. affirmed this determination. The London County Council appealed.

Held, dismissing the appeal: (1.) that the works in question were not works " reasonably executed for temporarily meeting " the circumstances created by the damage " within s. 6, sub-s. 2, of the War Damage Act, 1943. The damage contemplated by the Act was damage to land or buildings. The Act did not make provision for the expenses an owner might incur in carrying on his business elsewhere than on the damaged property. For works to be within s. 6, sub-s. 2, they must be works which were executed on the site of the damage and which, in most cases, would be removed when the damage was made good. Substituted works executed on other undamaged parts of the hereditament were not within the sub-section. (2.) If substituted works were otherwise within the sub-section, it would not be necessary to show that they would decay at an early date. Such works would have to be reasonably executed and, therefore, not made (if there were a choice) of unnecessarily durable material.

Appeal from Vaisey J. (1).

This was an appeal by the London County Council from a decision of Vaisey J. on a point of law affirming a decision of the War Damage Commission. The issue came before the court on a case stated by the respondents, the War Damage Commission.

On May 11, 1941, St. Luke's Hospital, Chelsea, a hospital owned and maintained by the London County Council,

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(1) [1948] W. N. 294.

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sustained war damage within the War Damage Act, 1943. The damage, which was caused by a high-explosive bomb, was mainly to the central building of the hospital. In 1942 certain works of permanent or temporary reinstatement were done as to which no question arose and which the War Damage Commission admitted fell within the provisions of the War Damage Act, 1943. The dispute arose as to certain other works which were described in para. 5 of the case stated as follows: "These works, which were carried out for the "purpose of affording substituted accommodation for the "provision of services, were not executed by way of reinstating "or repairing the parts of the damaged building in which "the corresponding accommodation and services had been "provided before the occurrence of the war damage, but "were carried out in different parts of the building as follows: "(1.) the main kitchen and scullery, which had been in the "basement, were constructed in a space formerly occupied "by stores in the basement at the southern end of the main "building; and (2.) the operating theatre, surgeon's dressing "room, sterilizing room, anæsthetizing room and X-ray "room, dark room and office, which had been on the first "floor, were constructed in a space previously occupied by "a ward on the ground floor at the north end of the main "building. The works relating to (1.) consisted of the removal "of stud and matchboard partitions which formed basement "rooms, the taking up of a timber floor, the filling of the "cavity with brick rubble, forming channels and putting "down a concrete floor about six inches thick, the installing "of sinks, and the installing of gas, electric and general "engineering services. The works relating to (2.) consisted "of the division of a ground-floor ward by the erection of "partitions constructed of timber covered with wallboard "so as to form separate rooms, the painting of the walls and "doors, the provision of electric lighting, the tapping of "the electric main in the street for intake, and installing "heavy electric cables to the X-ray room."

Paragraph 6 of the case stated: "In the opinion of the "Commission the works referred to in para. 5 looked at as a "whole would with ordinary care have an effective physical "life of about twenty-five years and some of the works would "individually have a life of from forty to fifty years."

In addition to the case stated the learned judge admitted in evidence certain correspondence from which it appeared

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that the execution of the works in dispute was necessary to enable the hospital to function and to enable the bed accommodation to be reinstated.

The question was whether the cost of these works fell within the provisions of s. 6, sub-s. 2, of the War Damage Act, 1943 (1). Vaisey J. held that the disputed works were not "works "reasonably executed for temporarily meeting the circum-"stances created by the damage" within s. 6, sub-s. 2. The London County Council appealed.

R. Moelwyn Hughes K.C. and *Squibb* for the London County Council. The work done in temporarily providing accommodation and services corresponding to those in existence before the hospital was bombed but in different parts of the building are temporary works within the War Damage Act, 1943, s. 6, sub-s. 2. The vital words defining temporary works giving rise to a right to a "temporary works payment" are "works reasonably executed for temporarily meeting

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(1) The War Damage Act, 1943, s. 6, sub-s. 1: "Subject to the "provisions of this Part of this "Act, a payment to be made "thereunder shall be one or other "of the following kinds, that is "to say:

"(*a*) a payment of cost of "works, being a payment of an "amount determined by reference "to the cost of works executed "for making good the damage, "as provided by section eight "of this Act; or

"(*b*) a value payment, being a "payment of an amount deter-"mined by reference to the "depreciation in the value of the "hereditament caused by the "damage, as provided by section "ten of this Act."

"Sub-s. 2: Where either a "payment of cost of works "or a value payment is made "in respect of war damage to a "hereditament, there shall be "made, in addition to that pay-"ment, a payment (in this Act "referred to as a 'temporary "'works payment') of an amount "equal to the proper cost of any "works reasonably executed for "temporarily meeting the circum-"stances created by the damage, "being:

"(*a*) where a payment of cost "of works is made, works, other "than those taken into account "in computing the amount of "that payment, executed between "the occurrence of the damage "and the time when it is made "good;

"(*b*) Where a value payment "is made, works executed be-"tween the occurrence of the "damage and the time when "the Commission's determination "to make that payment, and not "a payment of cost of works, "has been notified to all persons "having an interest in the heredi-"tament who have made a request "in writing to the Commission "to be notified thereof, or, if no "such request has been made, "the time of the Commission's "determination."

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"the circumstances created by the damage." The whole object of the work in the present case was to enable the hospital to be brought into use once more to the extent of 230 beds. There is no ground for saying that the temporary work must be done to the part of the hospital actually damaged. Under the sub-section the work to be done is not temporarily repairing the part of the building actually damaged but "temporarily meeting the circumstances created by the "damage." When great expense would necessarily be incurred in restoring temporarily the damaged part of the premises, why should not the work be done on other parts of the building to adapt them for what is needed? That is "to meet the "circumstances created by the damage." It is hard to understand why Vaisey J. should hold that these were arrangements made and not works executed. It is not as if the work was done outside the building. The circumstances flowing from the damage have been temporarily met by the work done.

Michael Rowe K.C. and *Danckwerts* for the War Damage Commission. A limit must be put on the meaning of "circumstances" in s. 6, sub-s. 2. There seems to be nothing at first sight to limit the work done to work in the hereditaments damaged but the fact that it is the war damage itself that is temporarily to be dealt with imposes the proper restriction. The more closely s. 6 is looked at, the more clear it is that the subject matter for which compensation is paid is the actual war damage: see s. 6, sub-s. 1. The payment to be made is to pay the costs of making good the physical damage. Vaisey J.'s approach to the matter is right, except in so far as he thought a damaged staircase inside a building could be replaced by an outside staircase.

[EVERSHED L.J. Work "for meeting the circumstances "created by the damage" must have a wider meaning than work for sterilizing the damage.]

Section 6, sub-s. 2 (*a*) makes clear the limited kind of work contemplated. What the sub-section covers are works of temporary repair and temporarily precaution. The subsection was phrased in 1941 when it was not known what kind of damage might be suffered. Further, it is common ground that the Act was not intended to give compensation for disturbance. If physical damage results in a total loss, there will be no payment of cost of works and accordingly no temporary works payment will be made however reasonable from a business point of view it may be to provide substituted accommodation: see s. 6, sub-s. 2 (*b*). If substituted accommodation were within sub-s. 2, it would be possible to provide such accommodation although the premises were a total loss. There is a distinction between temporary works and substituted accommodation. Payments under the Act are made in respect of damage to land but not in respect of the loss suffered as a result of such damage. The fact that s. 6, sub-s. 2 (*b*), provides that there can be no temporary works executed after there has been a determination that a value payment will be made, suggests that temporary works are precursors of permanent works. It makes no difference whether the substituted accommodation is on the damaged hereditament or off it. Such accommodation is in both cases outside the Act. Where works are temporary works, the cost both of their execution and removal falls on the War Damage Commission. These works are not "temporary" works, as, on the reinstatement of the original operating theatre, that operating theatre and the so-called temporary operating theatre could continue to function side by side. Then the War Damage Commission would have paid for two operating theatres. The Commission could not refuse to pay for the reinstatement of the old theatre on its original site. The temporary works must be physically related to the damaged works.

Moelwyn Hughes K.C. in reply. It has never been suggested that these works would have been executed in this form except for the war damage. "Temporary" has two meanings: First, something which cannot last, secondly, something which is not meant to last. If something in the nature of a makeshift is put up, it is within the intention of the Act. Looking at the Act as a whole, the intention was to enable property to be continued to be used notwithstanding it had suffered war damage. Take the case of windows: It is agreed that they need not be boarded up but that oiled paper may be substituted for the glass. The same thing has been done here. The only difference is that these works are not on the site of the war damage. The question is what is the meaning of the word "circumstances" in the sub-section.

Cur. adv. vult.

April 12. The following judgments were read.

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Somervell L.J. This is an appeal from a decision of Vaisey J. on an appeal by the appellants the London County Council on a point of law from a determination of the respondents the War Damage Commission. The right of appeal is given by s. 32, sub-s. 3, of the War Damage Act, 1943, and the procedure is regulated by R. S. C. Or. 55c. The issue comes before the court by way of a case stated by the War Damage Commission. By agreement between the parties certain correspondence was admitted by the learned judge by way of amplifying the facts as set out in the case. I do not think any difficulty arises in the present appeal, but it is desirable, if possible, that all facts which the court may be required to consider should be contained in the case or exhibits thereto. It is perhaps unnecessary to state that the War Damage Act, 1943, provides primarily for two categories of payment, a payment for the cost of works executed for making good the damage, or a value payment when the damages involves a " total loss " as defined in s. 7, sub-s. 2, of the Act. It is agreed that the damage in the present case was such that it will rank ultimately for a cost of works payment. The present appeal is not concerned with this but with the question whether the appellants can claim in respect of certain works a payment which is referred to in the Act as a " temporary works payment."

[His Lordship stated the facts and continued :] I will now refer to the relevant provisions of the Act. Section 1, sub-s. 1 (*a*), provides that payment shall be made in respect of " war damage to land." Section 2 defines war damage. Nothing I think, turns on this, but the categories of damage must be damage to land to be within the Act. As the learned judge said : " The Act does not deal with damage to a man's " pocket or convenience, but only with damage to his buildings " or land." It does not set out to make provision for the expense a man will be put to in living or carrying on his business elsewhere than in the property damaged. There is a reference in s. 2, sub-s. 2, to " any physical change in land." Section 5 defines the units that are to be treated as hereditaments for payments in respect of war damage. It is common ground that the works in question were within the " developed " hereditament " into which the bomb fell, though in undamaged portions of it. The case turns on s. 6, sub-ss. 1 and 2.

[His Lordship read s. 6 and continued :] The case for the appellants may be formulated as follows: These works were temporary in that they were not intended to be permanent. They were makeshifts until permanent work could be done. They were necessary if the hospital was to be brought back into use and were, therefore, reasonably executed "to meet "the circumstances created by the damage." What was done could, as the appellants said in their statement, in no sense be regarded as the equivalent of that in use prior to the occurrence of the damage, or as a making good of the damage by alterations to the hereditament.

If the words of sub-s. 2 are read apart from their context the phrase "the proper cost of any works reasonably executed "for temporarily meeting the circumstances created by "the damage," might cover the cost to a man whose factory had been destroyed of putting up on a different site a building where work could be carried on. The appellants do not suggest this would be covered. They submit, however, that if the works are within the area of the hereditament, though in an undamaged portion of it, their cost is covered. This would be illogical but may be the effect of the words used. The words must be read in their immediate context and of the Act as a whole. I agree with the learned judge that "temporarily" means work to be superseded as works by works intended to be permanent. In the present case, when this damaged building is repaired the substituted operating theatre remains an operating theatre and the kitchen a kitchen capable of being used as such. The distinction which I draw is well illustrated by the learned judge's examples. Under the heading of temporary repairs he instances the insertion of fabric materials in windows to be later glazed, or the patching up of holes in a roof which will later be reslated. They are "makeshifts" for meeting the physical circumstances caused by the damage where that damage occurred and not makeshifts constructed, as in this case, elsewhere to enable effective or more effective use to be made of the undamaged parts of the building, with such damaged part as can be repaired at the time.

The learned judge also, I think, rightly regarded what he described as works of precaution as covered by the clause. A protective fence round a crater to keep people from falling into it is, first of all, a work where the damage occurred. It temporarily meets the circumstances because, when the damage is made good, there is no danger from which people

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would need to be protected. Part of it at least would have to be removed when the crater was filled up. The fact that as matter of physical possibility, however unlikely, the remainder or indeed the whole might be left standing to serve some other purpose, or no purpose, would not, I think, affect the matter.

The learned judge's other example, an outside staircase to take the place of an interior one which had been damaged and became insecure, was referred to in the argument as a difficult and perhaps borderline case. It is distinguishable from the present case in that the work would be done to that part of the building which was damaged. It would be there to enable the building, or the upper part of it, to be used as a building whatever purpose it were put to. It is not necessary to decide the point, but I think that, if the Commission were satisfied that it was the reasonable method of meeting the physical circumstances of the damage to the staircase, it would be within the words.

In both classes of case, the physical circumstances created by the damage are met temporarily on the site of the damage. In most cases the works of physical necessity are removed when the damage is made good. In some cases their removal may not be a matter of physical necessity, but looked at objectively as a part of the structure or on the land, they are there to be removed when the damage is made good.

It was said that, if the narrower construction for which the War Damage Commission contend had been intended, a simpler formula would have been used. On the construction which I give to the word "temporarily," which sets the primary limits of the clause, I think the latter words are natural. "Temporarily repairing the damage" would have been too narrow, as it would have excluded the works of precaution, to use the learned judge's phrase. The nature of the damage that might be caused could not be foreseen, and having set the general limits by the use of the word "temporarily," it seems to me natural that the later words should give a certain latitude.

The conclusion to which the learned judge came, with which I agree, is reinforced by the fact that it is only "works" which are to be paid for. It would be illogical if a factory owner, who built a shed on an undamaged part of his hereditament, could recover the cost, whereas if he leased a shed next door he could not. The Act is concerned with physical damage and not with the cost of alternative or substituted accommodation.

I would like to add that if the words are not construed in this sense, and cover substituted accommodation erected at a distance from the damage, I find it difficult to restrict their scope, as Mr. Moelwyn Hughes sought to do in argument, to works within the developed hereditament. No such limitation is expressed and it must, therefore, be implied. So far from its being necessary to give the provision reasonable effect it would, as it seems to me, make it capricious and unfair. One man has room to put a shed in his yard; he will or may get indemnified for the cost; another has to put up a similar shed for a similar purpose in an empty plot he gets hold of near by, he cannot get paid for it. If the words cover substituted accommodation at a distance from the damage I find it difficult to restrict them. I myself am clear they do not.

I should say a word as to para. 6 of the case. It reads as follows: "In the opinion of the Commission the works "referred to in para. 5 looked at as a whole would with "ordinary care have an effective physical life of about twenty-"five years and some of the works would individually have a "life of from forty to fifty years."

I agree with the learned judge that if the substituted accommodation of the kind contended for by the appellants was within the sub-section, it would not be necessary to show that the works were likely to decay at an early date. They would, of course, have to be reasonably executed, and, therefore, not made (if there was a choice) of unnecessarily durable material. On the construction which I put on the clause, the works in this case are not within the sub-section for the reasons which, I hope, I have made plain. The appeal will be dismissed.

Evershed L.J. I confess that I have felt considerable difficulty in regard to this case; and not the less so because according to the correspondence which has been before us, the earlier view of the War Damage Commission appeared to be favourable to the appellants' case. But having had the advantage of seeing in advance the judgments of my brethren and the clear conclusions they have reached, I have, on the whole, come to the conclusion that the decision of the learned judge ought not to be disturbed. In the circumstances I shall state very briefly the reasons which have led me to this conclusion.

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The phrase "works reasonably incurred for temporarily "meeting the circumstances created by the damage" is prima facie one of broad import; and it is to be noted that it is in s. 2 to be contrasted with "measures taken . . . . to "mitigate the consequences of such damage." I am, however, satisfied: (1.) that the Act does not contemplate any payment under this head in respect of loss of profit or amenities to the owner as a result of war damage, and (2.) that the "works" to be undertaken must be executed on or in the single entity, namely, the developed or undeveloped "hereditament" which has sustained the damage. The owner is, therefore, disentitled to make a claim in respect of temporary works executed by him to provide substituted accommodation for himself or his business elsewhere than on the damaged hereditament, notwithstanding that such works could, in other contexts, fairly be said to have been executed for the purpose of "temporarily meeting the circumstances created by the "damage." Is he also disentitled to claim in respect of similar works executed on the "hereditament" which has been damaged, although on land separate from that on which the damaged building stands; or on a part of the damaged building or group of buildings removed from the scene of the damage? And, if not, where should the line be drawn?

I think myself that clearly the phrase in question covers something more than works of mere temporary repair or "protective" works—to take the examples cited during the argument, the insertion of fabric windows or the railing of a crater. In my judgment they are apt to cover also the case put by the learned judge of an outside staircase to take the place, temporarily, of an interior one rendered insecure or the case, put by me, of the (temporary) replacement of a lift by a staircase. To some extent, therefore, regard must be had to the use and the means of user of the "hereditament," and Mr. Rowe conceded as much. The real difficulty to my mind, therefore, lies in deciding how far "substituted "accommodation" of the kind above-mentioned extends. Does it extend to works reasonably executed to parts of the hereditament other than those damaged for the purpose of temporarily enabling the hereditament as a whole to continue, more or less, to perform its previous function? On the whole I agree that regard to the use of the buildings should be limited to their use as buildings and ought not to extend to their use for some particular business or purpose or for some special function. If this is not the correct view, than it would at any rate appear to follow that so long as the works were executed in or on the "hereditament" in question, the "circumstances" would cover the disturbance of the particular business carried on by the owner or the special use to which he had put the building; and (subject, of course, to the important qualification that the works must have been "reasonably executed") might entitle him to claim in respect of extensive works executed by him on other parts of the hereditament to enable him "temporarily" to continue the business or special use; and the continued use of such works would by no means be necessarily inconsistent with the restoration of the damaged part of the hereditament. I am, therefore, on the whole not prepared to say that the cost of the works here in question falls within the ambit of the section on the ground that they were works reasonably done to parts of the premises other than those parts damaged (or at least unrelated to any damage in fact done to them) in order to make the premises as a whole temporarily (that is for the time being and not by way of permanent substitution) usable in the way in which they were being used before the damage occurred.

I only add that I agree with Somervell L.J. that the durability of any works done is not, or at any rate is not necessarily, the test of their temporary character. Baulks to shore up a dangerous wall must obviously be capable of lasting a very long time, and a temporary staircase must be substantial enough to bear safely any traffic to which it may be subjected. In the circumstances I agree that the appeal ought to be dismissed.

Wynn-Parry J. This appeal involves the construction of the phrase in s. 6, sub-s. 2, of the War Damage Act, 1943, "the proper cost of any works reasonably executed for "temporarily meeting the circumstances created by the "damage." The facts upon which the appeal arises are set out in the stated case as amplified by the correspondence, which by agreement between the parties was read in the court below in amplification of the stated case, and those facts have also been referred to by Somervell L.J. in his judgment. I need not therefore refer to them further.

Two possible constructions have been put forward. That put forward by Mr. Moelwyn Hughes on behalf of the London

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County Council has been described by Mr. Rowe as unreasonably wide, while that put forward by Mr. Rowe on behalf of the War Damage Commission has been described by Mr. Moelwyn Hughes as unreasonably narrow. I have been unable to discover any half-way house, and I think one must choose between those two constructions.

It is plain from the language of the words under consideration that the "damage" referred to is the cause and "the "circumstances" referred to are the effect. The damage is the physical damage sustained by the hereditament in question, while the circumstances to be met mean the position resulting from that damage.

It is clear that some limit must be placed upon the right of a claimant to claim for a payment as a temporary works payment in respect of the cost to him of dealing with the position created by physical damage to the hereditament. This was realized by Mr. Moelwyn Hughes in his attractive argument, and he submitted that the limitation, but the only limitation, must be that the work should be done to or on the hereditament. Such a formula would clearly allow the cost of providing substituted accommodation, and must involve the proposition that the section intends that regard should be had to the particular user of the premises or the user for which the premises were designed or adapted at the time of, or immediately preceding, that damage.

This proposition does not find any place in the sub-section by way of express provision, and it can therefore be sound only if it follows by necessary implication from the language under consideration. It can, if at all, be extracted only from the words "for temporarily meeting the circumstances "created by the damage." Now I think if those words were to be construed in vacuo they could be said to be wide enough to warrant the proposition. But clearly those words cannot be construed in vacuo. They must be considered in the light of the other relevant sections of the Act and in the light of the scheme of the Act to be deduced therefrom.

It is clear from a study of such sections as ss. 2 and 5 that the damage which is contemplated by the Act is limited to damage to land and buildings, and from a study of the scheme of the Act that damage consisting of loss of profit or the cost of providing alternative accommodation is not damage in respect of which the War Damage Commission is to be liable to make payment. From this it appears to me that what is contemplated by s. 6 in providing for temporary works payments is essentially something limited in conception. It is the cost of dealing in an essentially temporary manner with the direct result of the damage. That does not mean that the work concerned is limited to repair. The example of railing off the crater, which was put in argument and in the judgment of the learned judge, is sufficient to demonstrate that. For my own part I am content to adopt the contention put forward by Mr. Rowe in his forceful argument that the phrase "the circumstances created by the damage" was inserted in the Act because until the end of the war, during which new engines of destruction were continually being evolved, it could not be known with certainty what would be the circumstances or position resulting from particular damage. To take the simplest case, a high-explosive bomb might blow a hole in a wall: but if there were gas in the bomb or if the high-explosive bomb were followed by a gas bomb, or it was a bomb which created a high degree of radio-activity, different or additional considerations might obtain. The draftsman of the Act, therefore, may well be said deliberately to have phrased the sub-section to meet the possible, but not accurately foreseeable, results of such occurrences.

So read, full effect is given to the phrase, "to meet the "circumstances created by the damage" upon the basis that it imports, as it must import, a wider meaning than mere repair of the damage, while at the same time not involving such a wide meaning as to allow of payments in respect of the provision of substituted accommodation, even within the curtilage of the hereditament.

This result avoids the illogicality which must result from Mr. Moelwyn Hughes' argument, if one takes two possible cases which seem to me permissible to test the argument. Suppose a hereditament of considerable acreage area on part only of which a factory is erected. Suppose the building incurs serious damage. The damage is such that it will ultimately rank for a cost of works payment, but no temporary repairs possible in war time will enable it, or anyhow the major part of it, to be used as a factory. There is room on the unbuilt-on part of the hereditament to construct buildings in which the apparatus and activities of the factory, or that part of it put out of action by the bomb, can be carried on as before. On the argument of Mr. Moelwyn Hughes, if this work was done, any necessary licences being obtained, the

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cost would be the subject of a temporary works payment; though the result in reality is a new works arising and subsisting by the side of the ruins of the old.

I cannot bring myself to believe that this is the necessary consequence of the words of s. 6, sub-s. 2, of the Act, the policy of which Act is, as I have already remarked, not to provide compensation for loss of profit or the cost of the provision of alternative accommodation elsewhere.

Contrast with this case a hereditament, consisting of a building covering the whole area of the land in question. The building receives a direct hit and is so damaged that, while it will form the subject of a cost of works payment, no work of temporary repair will enable the building to be used for its previous purpose until the permanent work of repair and reinstatement is undertaken. Suppose the building to have housed a factory or commercial undertaking: suppose it to have been a private dwelling-house: it matters not which. One thing is clear: the Act does not cover the cost of obtaining alternative accommodation. But the only difference between this and the previous example is that in the first there was the accident that the building did not cover the whole of the hereditament, while in the second case it did. If the argument of the London County Council is right, then in the first case the owner can claim the cost of providing substituted accommodation, while in the second case he cannot.

For my part I feel driven to the narrower construction which after all is not so narrow, for it includes not merely works of repair, but works of precaution and any other work directly related to the damage as the nature of the damage requires by way of temporary work. For these reasons I would dismiss the appeal.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor to the London County Council; Treasury Solicitor.*

B. A. B.

In re FLETCHER, DECD.
BARCLAYS BANK, LD. *v.* EWING AND OTHERS.

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Mar. 15, 16.

Will—Devise and bequest in trust for testator's daughter's "child P. "and any other child or children . . . ." of daughter—Daughter married but, to testator's knowledge, unable to have children—Two children adopted by testator's daughter and her husband and treated by testator as his grandchildren—Expression "children" in English will—Intention of testator—Adoption of Children Act, 1926 (16 & 17 *Geo.* 5, *c.* 29), *s.* 5, *sub-s.* 2.

Section 5, sub-s. 2, of the Adoption of Children Act, 1926, provides: "An adoption order shall not deprive the adopted child "of any right to or interest in property to which, but for the "order, the child would have been entitled under any intestacy "or disposition, whether occurring or made before or after the "making of the adoption order, or confer on the adopted child "any right to or interest in property as a child of the adopter, "and the expressions 'child,' 'children' and 'issue' where used "in any disposition, whether before or after the making of an "adoption order, shall not, unless the contrary intention appears, "include an adopted child or children or the issue of an adopted "child."

By a will made in the United States "in American form" the testator, who was born in Scotland and had become an American citizen, but had spent the last four years of his life in England, directed the trustees thereof, after the death of the testator's wife, to pay the capital of the trust estate "to my daughter H. "if living and if not then in equal shares to her child P. and any "other child or children of my said daughter her surviving who "would be entitled to share in her estate had she died intestate "a resident of the state of New York and possessed of personal "property." By a subsequent English will he gave his residuary estate to the plaintiff bank on trust subject as therein mentioned for H. "absolutely if she be living at my death but if she be then "dead . . . . for all and every the children or child of my said "daughter living at my death who being sons or a son have "attained or shall attain the age of 21 years or being daughters "or a daughter have attained or shall attain that age or previously "marry and if more than one in equal shares . . . ." By the latter will the testator provided that it should be read in conjunction with and not in any way as overriding or revoking (except and in so far as might be necessary for the purpose of giving effect to the directions concerning the disposition of his English estate therein contained) his will already executed to deal with his American estate. H. was domiciled in New York and married, but could not have children—as her husband and the testator knew. A year before the making of the American will she and her husband had adopted the boy, P. In the year when the English will was made they adopted a girl, I. The testator habitually

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referred to P. as H.'s child, to I. as P.'s sister and to himself as the grandfather of both P. and I. He died in 1943, and was predeceased by his wife and by H., who was alive at the date of the English will. On a summons to determine whether the residuary gift in the English will took effect in favour of P. and I. or whether the testator's residuary estate in England was undisposed of:—

Held, construing the English will on the footing that the testator was domiciled in England, (1.) that s. 5, sub-s. 2, did not exclude, in the case of a child adopted under the Act, any evidence which would have been admissible in the case of an illegitimate child, inasmuch as Parliament could not have intended to place an adopted child in a worse position than an illegitimate child; and that the Act showed no reason for applying to adopted children principles different from those applicable to illegitimate children; (2.) that as, in the circumstances, which were well known to the testator, it was impossible that any legitimate children could take under the bequest, the case fell directly within the principle stated by Lord Cairns in *Hill* v. *Crook* (1873) L. R. 6 H. L. 265, at p. 282, and applied by Jenkins J. in *In re Wohlgemuth*, ante, p. 12, and the residuary gift took effect in favour of P. and I., the adopted children of H.

ADJOURNED SUMMONS to determine whether a residuary gift in an English will in trust for all and every the children or child of the testator's daughter took effect in favour of the daughter's two adopted children or whether the residuary estate of the testator in England was undisposed of. By a will dated October 31, 1939, and made in the United States "in American form," the testator directed the trustees thereof, after the death of the testator's wife, to pay the whole of the capital of the trust estate to "my daughter Harriet Fletcher "Ewing if living and if not then in equal shares to her child "Peter Fletcher Ewing and any other child or children of my "said daughter her surviving who would be entitled to share in "her estate had she died intestate a resident of the State of New "York and possessed of personal property." By an English will dated January 9, 1942, the testator gave his residuary estate to the plaintiff bank on trust subject as therein mentioned for Harriet "absolutely if she be living at my death but if she "be then dead . . . . for all and every the children or "child . . . .of my said daughter living at my death who being "sons or a son have attained or shall attain the age of 21 years "or being daughters or a daughter have attained or shall "attain that age or previously marry and if more than one in "equal shares . . . ." By cl. 5 of the latter will the testator declared that it should be read in conjunction with and not in any way as overriding or revoking (except and in so far as might be necessary for the purpose of giving effect to the directions concerning the disposition of his English estate therein contained) his will already executed to deal with his American estate. At all material times his daughter was domiciled in New York, married, but incapable to the knowledge of her husband and of the testator of bearing a child. In 1938 she and her husband had, by formal order of a competent court in the United States, adopted the boy Peter mentioned in the testator's American will and, in 1942, they similarly adopted a girl, Irene. In each case they had some time previously de facto adopted the child in question. The testator habitually referred to Peter as his daughter's child, to Irene as Peter's sister and his daughter's child and to himself as the grandfather of Peter and Irene. On March 17, 1943, the testator died. He was born in Scotland, went to the United States at the age of twenty, and became a naturalized American citizen, living, however, in England from 1939 until his death. His wife and daughter Harriet Fletcher Ewing, who was living at the date of the English will, both predeceased him. He left no parent or issue, but left three sisters, him surviving. There were also three children of a deceased brother, but at the date of this summons the bank had not been able to trace them and it was not known whether they were living or, if dead, whether they left issue who survived the testator. It was felt that there might be doubts whether, at the date of the English will and of his death, the testator retained his American domicile, or had acquired a fresh domicile of choice in England, or had reverted to his Scottish domicile of origin, but it was thought that, in the circumstances of the case, the question raised by the summons could properly be determined without determining the testator's domicile and, accordingly, the bank in the first instance filed no evidence on domicile though much was available. The summons asked whether the residuary gift in the English will took effect in favour of the adopted children or whether the residuary estate in England was undisposed of.

A. H. Droop for the bank.

S. Pascoe Hayward K.C. and *Wilfred M. Hunt* for the adopted children. With the considered approval of a distinguished American lawyer whom the American courts have appointed to be their guardian ad litem, the two adopted children

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concede that the case should be considered on the footing that the testator had an English domicile. On the construction of the English will, the word "children" must, in the circumstances, be widely construed to include adopted children. If the court does not accept that, then it is contended that the expression "children of my said daughter" construed in an English will of a testator who is a foreigner domiciled in a country where adoption is recognized—which is the situation in the present case—prima facie includes adopted children. In the circumstances and on the evidence, the court can give no meaning at all to the will unless the word "children" is construed to include the two adopted children of H. They were in existence and were adopted at the date of the will. That is analogous with the principle of the cases dealing with illegitimate children, which must be applied here: see *In re Wohlgemuth* (1) in which the principle stated by Lord Cairns in *Hill* v. *Crook* (2) was applied. The question for decision is simply the meaning of the word "children" and for this purpose there is no distinction between illegitimate and adopted children. Thus, the words "unless the contrary "intention appears" in s. 5, sub-s. 2, are of the widest possible significance. Accordingly, if the "intention appears" from the circumstances of the case it "appears" just as well as if it had appeared from the construction of the language of the document in question: and in the present case, quite apart from circumstances, assistance is derived from the language of the English read in conjunction with the American will. The testator has himself said that the American will is to be used as a dictionary and has said, further, that it is not in any way to override or revoke (except as provided) the American will, in which he has undoubtedly used the word "children" to include adopted children. If Parliament had meant by "unless the contrary intention appears," "unless" it "appears" in the document, it would have said "unless the "contrary intention appears therein." That, however, is precisely what it has not said. It follows that the intention can appear from circumstances. The paramount circumstance in this case is that if the adopted children do not take there are no children who can take: and the evidence makes it clear that it was the adopted children whom the testator intended to benefit.

E. B. Stamp for two of the testator's three sisters. These sisters of the testator have given explicit instructions that the case is not to be argued on their behalf.

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(1) Ante p. 12. [illegible]

(2) (1873) L. R. 6 H. L. 265, 282.

M. Berkeley for the remaining sister. The remaining sister makes no claim against the adopted children, but she is joined in a representative capacity, and so authorizes the putting forward of whatever arguments can be advanced on behalf of the next-of-kin. In English law, adoption is not recognized save as provided by the Adoption of Children Act, 1926. Contrary to the contention for the adopted children, "the "contrary intention" must appear in the instrument itself, and could not appear in any other way. In English law, prima facie the word "child" does not include an adopted child: and a fortiori it would not include a child adopted under foreign law, because there is neither English statutory provision nor a decision of an English court that an adopted child can be included in the description "child" in a will. As to "the contrary intention" appearing in the instrument itself, it is clear from *In re Wohlgemuth* (1) that an illegitimate child can take under the description "child" where the intention that it shall take appears from the will itself and where the circumstances make it impossible to give any other meaning to the word "child." But all the cases relate to illegitimate, none of them to adopted, children and there is a distinction between the two. An illegitimate child is the child in fact, though not in law, of the parent in question. An adopted child is not the "child" of the adopting parents in any sense of the word. His is a purely artificial status. The decisions with regard to illegitimate children do not bind the court in this matter, for they do not necessarily apply to adopted children. The trouble is that s. 5, sub-s. 2, does not apply to this case, because it deals with an adoption order. "The "contrary intention" must appear from something and, the most natural inference being that it would appear from some document, the word "appears" must, on the true construction of the section mean "appears" from the instrument or disposition. Even conceding that on the evidence the daughter could not have children at the date of the English will, and that the testator knew in 1939 that she could not then have children, he may have altered his belief about the matter between 1939 and 1942. If, from the facts which have been proved and from the absence of evidence that he did change his mind, the court infers that he remained of the same belief at the date of the will, that disposes of that point: but, as the third sister appears in a representative capacity, it must be pointed out on her behalf that the only evidence of his belief is evidence of what it was in 1939. In theory—and this last point is entirely theoretical—the daughter could have had legitimate children who would take after the date of the will. Assuming that she had had an illegitimate child before she married her husband and that after the marriage her husband had died and she had married the father of that child—there being no impediment to her marrying him at the date of that child's birth—that child would have become a legitimate child and could have taken under a bequest to legitimate children. It must, however, be conceded that that point could have been taken in *In re Wohlgemuth* (1) but was not taken.

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(1) Ante p. 12.

ROXBURGH J. The evidence as to the testator's frame of mind relates mainly to a period before the year 1939, when he left the United States for England; and Mr. Berkeley has submitted that, though the testator well knew in 1939 that Mrs. Ewing was incapable of bearing a child, he may have thought differently between then and the date of his English will, January 8, 1942. That is, of course, a most improbable state of affairs, because nothing had happened in the meanwhile which could possibly have improved Mrs. Ewing's prospects of bearing a child; but I would go further and hold, and I do hold, that the correspondence which has been exhibited and which passed between the testator and his family during the period when he was in England and up to and past the date of the will, while containing no passage which could be said to show in terms that he has not changed his mind about the capacity of his daughter, appears plainly to be written on the implied hypothesis that the state of affairs relating to the incapacity of his daughter was constant, unchanged and unchangeable. So clearly had Mrs. Ewing realized her own incapacity, after much medical treatment, that she adopted two children. The order of adoption in the case of the boy, Peter, was dated June 25, 1938, and in the case of the girl, Irene, March 14, 1942. Throughout the testator refers to Peter as the child of Mrs. Ewing and to Irene as the sister of Peter and as a child of Mrs. Ewing and to himself as grandfather of these two

(1) Ante p. 12.

children. In fact in a letter of November 15, 1940, he writes to Mr. Ewing, the daughter's husband, in these terms: "Now "regarding the disposition of the 700 dollars. I remember "that when little Peter arrived on the scene I opened a bank "account for him in the sum of 1,000 dollars. I do not "remember, however, whether I did the same thing for little "Irene when she turned up. If I did not open a bank account "for her upon her arrival, then I would like you to take these "700 dollars, and another 300 dollars, making a sum of 1,000 "dollars and open a bank account for the little girl, you and "Kiltie"—that is, his daughter—"taking the joint respon"sibility of the sum until she comes of age."

In the present state of the evidence I can only construe the English will on the footing that the testator was domiciled in England, and I will say later why I think that it is sufficient to construe it only on that footing.

There is no doubt (and I start with this as a fundamental proposition) that "children" in an English will prima facie means legitimate children and prima facie does not include either illegitimate or adopted children. That being so, Mr. Pascoe Hayward for the adopted children, has adumbrated three arguments.

One was that the relationship of parent and child is one of status; that the status of the adopted children, according to the law of the State of New York, was the same for all purposes as that of a legitimate child and that I ought to apply the law of the domicile in a matter of status and that accordingly there should be no question but that I should treat these children as though they were lawful children. I have not called on Mr. Pascoe Hayward to develop that argument, because it became unnecessary to do so and I mention it only to show that it is still open to him if he requires to make use of it elsewhere.

His other two points Mr. Pascoe Hayward argued fully. His next point is that I must read the English will in conjunction with the American will; and certainly I must, because I am directed so to do. There is, I think, no doubt that, if I do, I must say that the testator was his own dictionary and that he clearly uses the word "child" to include adopted child; but Mr. Berkeley, whose position I will explain later has forcibly contended that, if I apply that process, I am violating the directions given to me by cl. 5, I shall, he says, be altering the directions concerning the disposition of the testator's English estate, because I shall be diverting in favour of adopted children property which would otherwise have gone to legitimate children and legitimate children only and, in default of legitimate children, as on an intestacy. There is much force in that submission: so much, that I prefer to leave the point undecided and to decide the case on the last ground which was dealt with by Mr. Pascoe Hayward. To do that, I must refer to the law relating to illegitimate children, though this case concerns not illegitimate but adopted children; and I must refer to the case of illegitimate children because several decisions have been given with regard to illegitimate children, but none hitherto, as far as I am aware, with regard to adopted children.

As regards illegitimate children, the law was authoritatively laid down by Lord Cairns in *Hill* v. *Crook* (1), and it has been applied quite recently by my brother Jenkins in *In re Wohlgemuth* (2). In *Hill* v. *Crook* (1), Lord Cairns said: "And what appears to me to be the principle which may "fairly be extracted from the cases upon this subject is "this—the term 'children' in a will prima facie means "legitimate children, and if there is nothing more in the will, "the circumstance that the person whose children are referred "to has illegitimate children will not entitle those illegitimate "children to take. But there are two classes of cases in which "that prima facie interpretation is departed from. One "class of case is where it is impossible from the circumstances "of the parties that any legitimate children could take under "the bequest. A familiar example of that might be given "in this way:—Suppose there is a bequest 'to the children "'of my daughter Jane,' Jane being dead, and having left "illegitimate children, but having left no legitimate children. "There, inasmuch as the testator must be taken to have "known the state of his family, and must be taken to have "intended to benefit some children of his daughter Jane, and "inasmuch as she had no children who could be benefited "except illegitimate children, rather than that the bequest "should fail altogether the courts will hold that those "illegitimate children are intended, and they will take under "the term 'children'."

Mr. Berkeley has submitted that I ought not to apply to an adopted child the principles which are applicable to an illegitimate child, on the ground that an illegitimate child is at least a natural child of the person named, whereas an adopted child has no status as a child, except such, if any, as is conferred on it by the adoption order. I am disinclined to draw such a distinction. I think that the question in every case is: In what sense has the testator used the word "children"? Prima facie he has used it in its natural sense, as meaning lawful children; but, if once I ought to come to the conclusion that he has not used it in its natural sense of lawful children, it seems to me that it must be legitimate to inquire into the sense in which he has used the word and that it makes no difference in principle whether I find that he has used it in the sense of illegitimate children or that he has used it in the sense of adopted children. It is common for people to speak of both illegitimate children and adopted children as "children" simpliciter.

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(1) L. R. 6 H. L. 265, 282.

(2) Ante p. 12.

A further argument against applying to adopted children the principles applicable to illegitimate children was founded by Mr. Berkeley on s. 5, sub-s. 2, of the Adoption of Children Act, 1926. He has submitted that I ought to construe the words "unless the contrary intention appears" in such a manner as to exclude some of the evidence which would be admissible in the case of an illegitimate child. I am not prepared so to construe them. It is unthinkable that Parliament intended to place an adopted child in a worse position than an illegitimate child. Suppose the case of an illegitimate child born in such circumstances that it could not be legitimated by the subsequent marriage of its natural parents; then suppose that the natural parents marry and, being unable to legitimate their natural child, adopt it—a not uncommon course. The adopted child would then be in a worse position than it would have been if it had not been adopted, if Mr. Berkeley's submission is correct, unless I accept his solution, which is that in such a case the court would look behind the adoption order to the anterior illegitimacy, which it is one of the purposes of the adoption order to hide.

I cannot accept Mr. Berkeley's solution of this problem. I feel bound to hold that s. 5, sub-s. 2, does not exclude, in the case of a child adopted under the Act of 1926, any evidence which would have been admissible in the case of an illegitimate child. There seems, therefore, in my judgment, to be no reason to be found in the Adoption of Children Act, 1926, which ought to lead the court to apply different principles to illegitimate children and adopted children respectively.

If that be right, the case is clear. It was impossible from the circumstances of the parties, which were fully known to the testator, that any legitimate children could take under the bequest.

Mr. Berkeley put forward one further conceivable hypothesis. It is, of course, admittedly an hypothesis and, I may add, a most improbable one. It is that Mrs. Ewing, before her marriage and before the advent of her incapacity, might have had an illegitimate child; that she might then have married Mr. Ewing; that then her marriage to Mr. Ewing might have come to an end before the death of the testator; and that then she might have married the man by whom she had the hypothetical illegitimate child before her marriage to Mr. Ewing, and thereupon that such child might have become legitimated.

What Lord Cairns says is (1): ". . . . inasmuch as the "testator must be taken to have known the state of his family, "and must be taken to have intended to benefit some children "of his daughter Jane, and inasmuch as she had no children who "could be benefited except illegitimate children, rather than "that the bequest should fail altogether the courts will hold "that those illegitimate children are intended, and they will "take under the term 'children'." In applying that reasoning I decline altogether to embark on a hypothesis which is in itself most remote and which such evidence as there is, though none of it was expressly directed to any such hypothesis, shows wholly to lack foundation in the present case. I cannot believe for one moment that the testator ever contemplated some such hypothetical illegitimate child as Mr. Berkeley has suggested. Accordingly, it seems to me quite clear that this case falls directly within the principle stated by Lord Cairns and the adopted children succeed.

I have already said that I have decided this upon the footing of English domicile. The contest is, of course, between the adopted children and next of kin. It has been proved that the class of persons to take on an intestacy in the circumstances of this case is the same whether English or Scots or American law is applied, and the class consists of four stirpes, namely, three sisters of the testator and the children of a deceased brother.

Mr. Stamp appears for the first two sisters and they have

(1) L. R. 6 H. L. 265, 282.

decided that they do not wish to resist the adopted children's claim. Mr. Berkeley appears for the third sister and, very largely for the assistance of the court (because I think that there was some reluctance on the part of his client to do so) he has argued the case fully. I may say at once that Mr. Berkeley showed no reluctance in arguing it. He elected, as he was entitled to do, to argue the case on the footing of an English domicile; but there is, of course, the difficulty about the unrepresented children of the deceased brother, who in fact have been found difficult to trace. Of course, there is a prima facie presumption that Mr. Berkeley, whose interest is identical with that of the absent parties, would not have elected to adopt the English domicile if an American domicile would have proved more favourable to his argument and I think that it may well be that when I have heard a little more I shall be able, notwithstanding the absence of the children of the deceased brother, to authorize the bank to proceed on the footing that the adopted children are entitled; but I must hear a little more about that and I will do so now.

M. Berkeley for the remaining sister. There are the opinions of two American lawyers, both exhibited to the affidavit filed on behalf of the bank. The first definitely expresses the opinion that the adopted children would take: and from the second it is reasonable to infer that under the law of the State of New York an adopted child can take as a child. In view of the possibility of there being a Scottish domicile the opinion of a Scottish lawyer also was obtained. It states that "child" means legitimate child. Accordingly, prima facie Scottish appears to be the same as English law.

ROXBURGH J. I authorize the bank to administer and distribute the estate on the footing that the adopted children are entitled and on the footing of an English domicile. The costs as between solicitor and client will be paid out of the English estate in due course of administration.

Declarations accordingly.

Solicitors: *Ager & Ager; Godden, Holme & Co.; Parker, Garrett & Co.; Simmonds, Church Rackham & Co.*

K. R. A. H.

C. A.

1949

Apr. 1, 4.

Somervell and Evershed L.JJ. and Wynn-Parry J.

In re HAMBRO'S MARRIAGE SETTLEMENTS.
HAMBRO *v.* HAMBRO.

Power—Defective execution—Joint power to spouses and survivor to appoint to issue of marriage with or without power of revocation—Joint appointment reserving power of revocation by deed to survivor—Survivor appoints by will—No implied revocation.

By two settlements dated July 16, 1894, made in contemplation of the marriage of the husband and wife funds were settled, subject to their prior life interests, upon trust for the issue of the marriage as the husband and wife should by deed jointly appoint with or without power of revocation and new appointment and in default of any such appointment as the survivor should by deed or will appoint and in default of appointment upon trust for the children of the marriage. There were two sons and two daughters of the marriage. By a deed of appointment dated February 11, 1936, the husband and wife exercised the joint power conferred by the settlements and appointed the trust fund in favour of the four children of the marriage in unequal shares, reserving power to revoke or vary the appointment, such power to be exercised " by deed during their joint lives or by the survivor " during his or her life. The wife died in 1942 without having joined in exercising the power of revocation. The husband by his will dated September 14, 1943, purported to exercise the power conferred on him by the settlements and appointed the whole of both trust funds in favour of the two sons. The trustees of the settlements sought a determination by the court whether the appointment in the husband's will operated as a revocation of the previous appointment by deed and as a variation of the appointment thereby made.

Held, affirming the decision of Roxburgh J., ante, p. 111, but on different grounds, that the settlements and appointments must be read together and, so reading them, on their true construction the limitation of the power of revocation in the appointment to a power to revoke by deed was of the essence of the power and accordingly the power of revocation could not be exercisable by will.

Tollet v. *Tollet* (1728) 2 Peere Wms. 489 considered. The observations of Rolt L.J. in *Cooper* v. *Martin* (1867) L. R. 3 Ch. 47 considered and applied.

APPEAL from a decision of Roxburgh J. (1).

By two settlements each dated July 16, 1894, made in contemplation of the marriage of Sir Charles Eric Hambro and Dame Sybil Emily Hambro certain trust funds were settled, subject to the prior life interests of the spouses, in trust for all or such one or more exclusively of the other or

(1) Ante p. 111.

others of the issue of the intended marriage at such age or times or respective ages or times and if more than one in such shares as Sir Charles Eric Hambro and Dame Sybil Emily Hambro should by any deed or deeds with or without power of revocation and new appointment jointly appoint and, in default of appointment and so far as any such appointment should not extend, then as the survivor of them should in like manner or by his or her will or any codicil thereto appoint and, in default of any such appointment and so far as any such appointment should not extend, in trust for all the children or any child of the said intended marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry under that age.

There were four children of the marriage, the appellants Charles Jocelyn Hambro (afterwards Sir Charles Jocelyn Hambro) and Richard Everard Hambro and the respondents Zeila Mary Osborne and Juliet Carin Hambro. The marriage of Sir Charles Eric Hambro and Dame Sybil Emily Hambro was dissolved and subsequently by a deed of appointment dated February 11, 1936, they joined in exercising the powers of appointment conferred by the two settlements of 1894 and appointed the trust funds as to seven-twentieths for Charles Jocelyn Hambro absolutely, as to five-twentieths for Richard Everard Hambro absolutely, as to four-twentieths for Zelia Mary Hambro absolutely, as to four-twentieths for Juliet Carin Hambro if she should attain the age of twenty-one years or marry under that age absolutely. That appointment reserved a power of revocation in the following terms: "Provided always "that the appointors during their joint lives or the survivor "of them during his or her life may from time to time by "any deed revoke or vary either wholly or partially the "appointments hereby made in favour of the said Richard "Everard Hambro, Zelia Mary Hambro and Juliet Carin "Hambro." That appointment was never revoked by the appointors or either of them by deed.

Dame Sybil Emily Hambro died in 1942. Sir Charles Eric Hambro by cl. 2 of his will dated September 14, 1943, provided as follows: "In exercise of the powers for this purpose "conferred on me by the two settlements each dated July 16, "1894, made on my marriage with my late wife Sybil Emily "I appoint that the trustees for the time being of the said "two settlements shall stand possessed of the money and "investments which shall be held upon the trusts thereof "at my death in trust for my sons Charles Jocelyn and "Richard Everard in equal shares absolutely." Provision had in fact been made for the two daughters of the marriage but not out of either of the settled trust funds. Sir Charles Eric Hambro died on December 28, 1947.

The trustees of the settlements by this summons asked, inter alia, whether the appointment in favour of the appellants Sir Charles Jocelyn Hambro and Richard Everard Hambro operated as a revocation of the appointments in the deed of 1936. Roxburgh J. held that the appointment in the will of Sir Charles Eric did not operate to revoke the appointments by the deed of 1936. Sir Charles Jocelyn Hambro and Richard Everard Hambro appealed.

Ungoed-Thomas K.C. and *Victor Coen* for the appellants. It is submitted that the appointment in the will of Sir Charles Eric Hambro was, apart from the question whether it should have been by deed, a valid exercise of the power of revocation reserved by the deed of 1936. A revocation of a previous appointment need not be express or refer to the document reserving the power of revocation: *In re Chatterton's Settlement* (1). Nor need there be an actual intention to revoke. Such an intention will be implied so far as may be necessary to give effect to a subsequent appointment: *Bruce* v. *Bruce* (2); *In re Walker* (3). A court of equity will aid a defective execution of a power in order to give effect to the intention of an appointor unless it would be inequitable to do so: *Chapman* v. *Gibson* (4), White and Tudor's Leading Cases in Equity, 9th ed., vol. II., p. 249. *Tollet* v. *Tollet* (5) lays down a general equitable principle and is not limited to cases dealing with copyhold land. Further, the court will aid a defective execution of a power of appointment where the appointment should have been by deed and is in fact made by will: *Cooper* v. *Martin* (6). It would not be inequitable for the court to give relief here, as the two daughters have been provided for otherwise than out of the trust fund.

Jennings K.C. and *G. D. Johnston* for the respondents. It is common ground that equity will not aid the defective execution of a power by will where it should have been executed by deed, if execution by deed was an essential part of the execution: *Cooper* v. *Martin* (1). Here on the true construction of the appointment of 1936 execution by deed is of the essence of the power of revocation thereby reserved. The doctrine laid down in *Tollet* v. *Tollet* (2) aiding defective appointments should not be extended. The court never aids the non-execution of a power, by parity of reasoning it will not aid the revocation of an appointment. There may be a moral duty to appoint, there is none to revoke an appointment: *In re Walker* (3). A stronger case is required to take the property away from appointees than from persons entitled in default of appointment. There is no case in which the court has aided the defective execution of a power of revocation. Here there has never been a valid exercise of the power of revocation and accordingly there was no valid appointment made by the will of Sir Charles Eric Hambro. The court will not aid the defective execution of a power of revocation which the appointor never had it in mind to exercise.

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(1) [1946] Ch. 284.
(2) (1870) L. R. 11 Eq. 371.
(3) [1908] 1 Ch. 560.
(4) (1791) 3 Bro. C. C. 229.
(5) (1728) 2 Peere Wms. 489.
(6) (1867) L. R. 3 Ch. 47.

Teague for the respondent trustees.

SOMERVELL L.J. Before the learned judge and before us the main argument was directed to invoking, or seeking to apply, the equitable doctrine under which defective executions of powers are aided. We were referred to a number of authorities to which, for reasons I shall give, it will not be necessary for me to refer in any detail. The leading case in White and Tudor's Leading Cases in Equity, 9th ed., vol. II, p. 249, is *Tollet* v. *Tollet* (2). The first sentence of the headnote is in these terms: "Husband has a power to make a jointure "to his wife by deed: he does it by will, and she has no other "provision; equity will make this good." That case concerned the surrender of a copyhold and undoubtedly it and some of the earlier cases do deal with that subject matter; but, as Mr. Ungoed-Thomas submitted and as the authorities show, the doctrine is not confined to such a class of case and is capable of a wider application.

It has been recognized that where a power is to be exercised by deed, the court will not aid a defective exercise by will if satisfied that the restriction to exercise by deed is of the essence of the provision. That is best stated in *Cooper* v.

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(1) L. R. 3 Ch. 47.

(2) 2 Peere Wms. 489.

(3) [1908] 1 Ch. 560.

Martin (1), in a passage which I shall read from Rolt L.J.'s judgment: "There can be no doubt of the general rule, "that in favour of an object of the power, who is a son of "the donee, a court of equity will supply the defect where the "power which ought to have been executed by deed has been "exercised by will, if there is nothing in the instrument "creating the power to mark the testator's intention on the "subject, beyond the fact that he has pointed to a deed as "the mode of executing the power. So far, the appellant's "contention is not disputed. But the decisions which have "thus settled this question have not, I apprehend, determined "that it is not competent to a settlor to make the nature "and character of the instrument by which the power he "creates shall be executed of the essence of the power, without "observing which no execution of his power shall be valid. "They have all, as I understand them, recognized the principle "that anything material to the intention of the donee of the "power may not be defeated, and have proceeded (perhaps "somewhat singularly) on the opinion, that to a donor who had "merely given a direction that his power should be executed "by deed it was immaterial whether it was executed by "deed or will. But it is not, I apprehend, to be doubted "that equity in these cases, as well as in others, will never "uphold an act which will defeat what the person creating "the power has declared, by expression or necessary "implication, to be a material part of his intention."

I have come to the conclusion, first of all, that one must read these two documents—that is to say, the original settlements and the deed of appointment—together, and so reading them, it appears that whereas under the settlements the survivor had power to appoint by will, under the deed of appointment the power of revocation which the appointors reserved to themselves was a power to revoke by deed only. Mr. Ungoed-Thomas submitted that that might be a slip. No doubt that is possible, but, construing, as the court has to do, the words which are used in documents which come before it, I myself cannot so regard it. I think the only conclusion is that the omission was deliberate. I come to that conclusion the more readily because provisions that matters of this kind can be dealt with by deed or will are common, and where you find the power given in the settlement cut down and restricted in the deed of appointment, I think

(1) L. R. 3 Ch. 47, 57.

the court must regard that cutting down (to use Rolt L.J.'s words) as marking in this case the appointors' intention on the subject and as being of the essence of the power of revocation, and, if that is so, then, in my view, there is no room for the doctrine to which I have referred and on which the main argument was based.

The learned judge who decided the case held that the appointment by will did not operate to revoke the appointment by deed, a conclusion which we are affirming, but he decided it not on the ground which I have stated but on the ground that there was no precedent for applying the doctrine in the circumstances of this case. The circumstances are shortly as follows, that it is necessary, if the doctrine is to be invoked and what is provided for in the will is to be implemented, to construe what is said in the will as an implied revocation of the earlier deed of appointment, to which, as will have been seen, the will makes no reference. There is no case—and this is common ground—in the books in which the doctrine has been applied to an exercise of a power of appointment which is not only defective in form but which has to be construed as an implied revocation of some earlier instrument. It was on those grounds that the learned judge decided that the appointment by will could not operate.

It is unnecessary to decide that point in this case. All I wish to emphasize is that if it had been necessary to decide it, we might or might not have agreed with the conclusion to which the learned judge came; but, it will be open for argument when it arises. For those reasons, I think that this appeal must be dismissed.

EVERSHED L.J. I agree. I venture only to add one further consideration on the question whether here the provision in the deed of appointment that it was revocable by deed was (to use the language in the cases) of the essence of the matter. As observed by Rolt L.J. in the passage read by my brother, in a case of a settlement by deed or by will giving powers of appointment among children, it is regarded as an immaterial consideration, prima facie, that the settlor or testator may have said that the survivor of the spouses might appoint by deed instead of by deed or will; but I am far from clear that such considerations apply in a case, such as the present, where two persons, a divorced husband and wife, meet together and execute by deed an appointment

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HAMBRO'S MARRIAGE SETTLEMENTS, *In re.*

HAMBRO *v.* HAMBRO.

Evershed L.J.

among children, reserving by deed a power of revocation to the survivor. It seems to me that the immateriality which you might well say was contained in the power of appointment in a settlement by no means necessarily applies—indeed, I should think the reverse—in the case of an appointment by deed which was to be revocable in certain circumstances.

For this reason, as well as that stated by my Lord, I think this appeal fails. I would desire also to reserve any opinion upon the other matters that have been raised in the course of the argument.

WYNN-PARRY J. I agree, and I have nothing to add on either point.

Appeal dismissed.

Solicitors: *Broad & Son; Haslewood, Hare & Co. for Basset & Boucher, Rochester; Hawes & Udall.*

B. A. B.

VAISEY J.

1949

Mar. 3.

In re LATTA'S MARRIAGE SETTLEMENT TRUSTS.

PUBLIC TRUSTEE *v.* LATTA AND ANOTHER.

Settlement—Special power of appointment—General appointment by will "Give devise and appoint all my property"—Inclusion of persons not objects of the power—Validity and extent of appointment.

The testator as the survivor of himself and his wife was at his death entitled to exercise a power of appointment under his marriage settlement made in 1901. The power was declared to be exercisable by deed or will in favour "of the children or remoter "issue of the . . . . marriage." By a deed dated June 29, 1927, and expressed to be supplemental to the marriage settlement the testator released his power of appointment under the said settlement so far as it extended to issue of the marriage remoter than his children. There were two children of the marriage, a son and daughter. The latter died a spinster in 1943. The testator made his will on March 13, 1946, and he provided by cl. 3 thereof: "I give devise and appoint all my property real "and personal unto my said son in fee simple and absolutely: "provided always that if my said son shall die in my lifetime "leaving issue living at my death who shall attain the age of "twenty-one years such issue shall take and if more than one in "equal shares the property which their father would have taken "hereunder." He died in 1947.

The testator had never exercised the special power by deed, and he possessed no other testamentary power of appointment.

Held, that the will operated as a valid exercise of the power of appointment contained in the marriage settlement. The testator had used the word "appoint" to which, if possible, effect must be given. Although the substitutional gift to the son's issue could not have operated, there was no difference between the case in which non-objects of the power were brought in by way of a substitutional appointment and that in which objects and non-objects were mixed up.

In re Mayhew [1901] 1 Ch. 677 and *In re Swinburne* (1884) 27 Ch. D. 696, followed.

ADJOURNED SUMMONS.

The testator William Latta and his wife, then Janet Halley Cuthbertson, were married in 1901. By their marriage settlement dated October 16, 1901, certain funds were settled by the wife upon the following terms: "Upon trust to pay the "said income unto the said William Latta during his life "And from and after the death of the survivor of them the "said William Latta and Janet Halley Cuthbertson the said "Trustees shall stand possessed of the Trust Fund and the "income thereof Upon Trust for all or such one or more "exclusively of the others or other of the children or remoter "issue of the intended marriage at such time or times and if "more than one in such shares and with such gifts over and "such provisions for maintenance advancement and otherwise "at the discretion of any person or persons and generally in "such manner for the benefit of such children and issue or "some or one of them as the said William Latta and Janet "Halley Cuthbertson shall jointly during their joint lives by "deed revocable or irrevocable from time to time or at any "time appoint And in default of and until and subject to "any such appointment then as the survivor of them shall "by deed revocable or irrevocable from time to time or at any "time or by Will or Codicil appoint And in default of and "until and subject to any such appointment Upon trust for "all or any of the children or child of the said intended "marriage who being sons or a son shall attain the age of "twenty one years or being daughters or a daughter shall "attain that age or marry under that age in equal shares if "more than one."

The settlement also contained a covenant by the wife to

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settle her after-acquired property (subject to certain immaterial exceptions) of a value of 1,000*l.* or more. The power of appointing new trustees was vested in the husband and wife during their joint lives. That power was exercised in 1913 when the Public Trustee was appointed sole trustee of the settlement in place of the original trustees of whom one was dead and the other had retired.

There were two children of the marriage, Margaret Cuthbertson Latta and a son Gordon Cuthbertson Latta, the first defendant. The wife died on October 21, 1926. At her death the joint power of appointment had not been exercised. It was discovered that the covenant by the wife to settle her after-acquired property had been disregarded. A deed of release and indemnity, expressed to be supplemental to the settlement was accordingly executed on June 29, 1927, to rectify the omission. The parties to the deed were the testator, his son and daughter, the wife's executors and the Public Trustee. By this deed the testator released his power of appointment under the marriage settlement so far as it extended to issue of the marriage remoter than his children, but expressly reserved the power to appoint to the son and daughter, or either of them. Certain investments were transferred to the Public Trustee and accepted as a complete satisfaction of the wife's obligation to settle after-acquired property.

By a further deed of May 21, 1929, made between the testator, his son and daughter of the first part, the Public Trustee of the second part and the testator and his son of the third part, certain funds were withdrawn from the marriage settlement, and resettled upon trusts corresponding to those of the original settlement, but with an extended power of investment. The daughter died a spinster on April 27, 1943.

The testator made his will on March 13, 1946, and by cl. 3 thereof he provided: "subject as aforesaid I give devise and "appoint all my property real and personal unto my said son "in fee simple and absolutely: provided always that if my "said son shall die in my lifetime leaving issue living at my "death who shall attain the age of twenty-one years such issue "shall take and if more than one equal shares the property "which their father would have taken hereunder." By a codicil dated May 18, 1946, the testator increased the amount of a certain legacy and in all other respects confirmed his will. He died on June 17, 1947. His will was duly proved on December 3, 1947.

The evidence was that the testator had no testamentary power of appointment save those contained in the marriage settlement and the deed of May 21, 1929, and that he had never by deed exercised this power.

The question raised by the summons was whether the said will operated as a valid exercise of the power of appointment contained in the marriage settlement.

O. Swingland for the plaintiff, the Public Trustee.

E. G. Wright for the testator's son. The word "appoint" must refer to a special power: *In re Mayhew* (1). The testator had no other power. As to the substitutional gift to issue, the testator had probably forgotten that he had partially released the power, and the existence of gifts to non-objects would not be conclusive against me even if they had never been objects: see *In re Swinburne* (2). The fact that the property was dealt with in one mass with the testator's own property is not inconsistent with an intention to exercise the power, because the will contains no trusts for conversion or otherwise, and does not even appoint trustees.

W. J. C. Tonge for one of the executors of the will of the daughter.

The question is whether the testator intended the will to operate in exercise of the power of appointment. In this particular case it ought to be assumed that he knew of the existence of the power when he made his will and that he did not intend to exercise it. The testator was himself a trustee of the instrument creating the power and he had himself truncated the power, by releasing it in so far as it extended to issue more remote than his children when he executed the deed of release and indemnity in 1927. If the will were read as exercising the power the testator was deliberately in certain events appointing in favour of people whom, by his own act, he had made non-objects. He used the word "devise" which was appropriate to pass real estate, but omitted to use the word "bequeath." The only other operative word of disposition was "appoint." That word should be read as the appropriate word to dispose of the personalty having regard to the absence of any other appropriate word. In those circumstances the words in the will are inconsistent with any exercise of the power: see *In re Holford's Settle-*

(1) [1901] 1 Ch. 677.

(2) (1884) 27 Ch. D. 696.

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ment (1). The will was clearly made by a professional draftsman who had the existence of the power present in his mind. Having regard to the words he has used and the fact that he has treated the whole of the testator's estate as one mass, the will should not be read as exercising the power.

Vaisey J. stated the facts and proceeded: The point raised by this summons is a familiar one, but it is raised in a somewhat novel form in the present case. The point is a familiar one because testators frequently use expressions which are consistent both with the exercise and with the non-exercise of powers which they may possess. It is always a question of weighing on one side and the other the considerations which are in favour of the view that the power is exercised and the considerations which point the other way. Here the indications on each side are very few and slight. On the one hand the testator undoubtedly uses the word "appoint." On the other hand, he has included among the objects of his bounty not only his son who was admittedly an object of both the powers which the testator possessed, but he has purported to benefit by way of substitution the son's issue in the event of the son predeceasing him, which event did not, of course, happen. His power to appoint to the issue of the son had been released by the deed of June 29, 1927, and that release was emphasized by the testator having covenanted in plain terms not to exercise it in favour of any issue of his remoter than his son and daughter.

There is a wealth of authority on this kind of point. I do not propose to attempt an elaborate review of the cases because, so far as I am concerned, I do not think I could do it in any different form from that which appears in my judgment in *In re Holford's Settlement* (1). The facts of that case are not relevant to the facts of the present case. There, having attempted a review of the authorities either way, I came to the conclusion that in spite of the fact that there were some indications in the will of an intention to exercise the powers, on the balance of considerations the power had not been exercised.

The case which seems to me to be nearest to the present case and to throw the most light upon it is *In re Mayhew* (2). In that case there was also a short will. The testatrix said: "'I appoint, devise, and bequeath my real estate and the

(1) [1945] Ch. 21. (2) [1901] 1 Ch. 677.

" 'residue of my personal estate to my trustees upon trust to " 'sell or convert the same into money, and to pay and divide " 'the proceeds (after paying my debts, funeral and testamentary expenses) equally between four named nephews " and nieces, 'or such of them as shall be living at my " 'decease'." In fact they all survived the testatrix, and she had the testamentary power of appointing a certain share among her nephews and nieces. Evidence was tendered to show that she had no other power of appointment. It was held that the evidence was admissible and that the power was exercised.

The case of *In re Mayhew* (1) was a decision of Farwell J. who was notably an authority on all questions relating to powers of appointment. He said: " The case is very near " the line, but I have come to the conclusion that the limited " power was exercised. I start with the fact that the gift is " to objects of the power." Then dealing with the direction in that will about the payment of debts, which does not arise here, he calls attention to the fact that there was evidence that the testatrix had no other power. After saying that that evidence was admissible, his Lordship went on to say this: " She uses the words 'I appoint, devise, and bequeath.' " Now, the word 'appoint' is a word of art, prima facie having " reference to powers only. I do not of course say that if there " were no other words of disposition the word 'appoint' in " itself would not pass all the testatrix's property. But here " I have the three words 'appoint, devise, and bequeath,' and " the word 'appoint' in this collocation necessarily refers " to a power. I therefore read the will as if the testatrix had " said, 'I devise and bequeath, and in exercise of every power " 'enabling me in this behalf I appoint'." After saying that he had a little doubt at first whether the word " appoint " might not be satisfied by limiting its reference to any power acquired subsequently to the date of the will, he referred to the previous cases of *In re Teape's Trusts* (2) and *In re Swinburne* (3), in both of which it was held there was a sufficient reference to a special power. Farwell J. pointed out that in that case the words " devise and bequeath " would be sufficient in themselves to exercise a general power so that he was only following the general rule and giving effect, so far as possible, to every word used by the testator. He said that (1): " the

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(1) [1901] 1 Ch. 677, 679, 680.

(2) (1873) L. R. 16 Eq. 442.

(3) 27 Ch. D. 696.

"word 'appoint' must necessarily refer to a special power." There, putting on the one side the word "appoint," and the fact that the beneficiaries were objects of the power, and setting on the other side the otiose or incorrect direction that the trustees should sell and convert the appointed fund into money and pay the testator's debts, funeral and testamentary expenses, the learned judge came to the conclusion that the power was well exercised.

I refer next to the case of *In re Swinburne* (1) which was a decision of Pearson J. There a testatrix had a testamentary power of appointment among certain nephews and nieces. "She, by her will, gave all the real and personal estate of "which she might be seised or possessed at the time of her "death, or over which she might have any testamentary "power of disposition, to trustees, upon trust for sale and "conversion, and to stand possessed of the proceeds (which "she described as 'my said trust funds') upon trust to pay "costs and expenses, and to pay her debts and funeral expenses "and certain pecuniary legacies, and then upon trust as to "two one-fourth parts of her trust funds respectively for "persons who were objects of the power; and upon trust as "to the other two one-fourth parts respectively for persons "who were not objects of the power. And she declared that, "in the case of the failure of the trusts thereinbefore declared "of any of the one-fourth parts of her trust funds, the one-"fourth part, or so much thereof of which the trusts should "fail, should be held upon the trusts thereinbefore declared of "the others or other of the fourth parts of which the trusts "should not fail." There it was held that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised. Pearson J. begins his judgment (2) by pointing out that "The testatrix has contrived to express her will in "such a way as to create as much difficulty as possible in the "construction of it . . . . The first question is, did she "intend to exercise at all the special power of appointment "given to her by her brother's will, or did she only intend to "exercise any general power of appointment by will which she "might have? It is conceded that she had in fact no other "testamentary power of appointment, and if I come to the "conclusion that she did not intend to exercise this special "power, I shall in fact strike out of the will the words 'over

(1) 27 Ch. D. 696. (2) Ibid. 702.

" ' which I may have any testamentary power of disposition. " I think I cannot do that." The learned judge came to the conclusion that the power of appointment had in all the circumstances been fully exercised.

Among the cases to which I referred in *In re Holford's Settlement* (1) there are several which seem to me to be helpful, including *In re Ackerley* (2), *In re Milner* (3) and *Von Brockdorff* v. *Malcolm* (4). The last was the case of a will which contained no reference to the power but did include the words " over which at the time of my decease I shall have " any beneficial disposing power by this my will." There the gift was made to trustees upon trust partly for persons who were objects of the power, and partly in excess of the power. It was held that the power was exercised by the will, the trusts so far as they were in excess of the power being inoperative.

Here it is contended by Mr. Tonge that the testator is undoubtedly dealing with the property, both his own property and the property which he was appointing, as one mass; but in both cases to which I have referred the same criticism was advanced, and it was, nevertheless, held that the will operated to exercise the power.

In my judgment this testator by using the word " appoint " has used a word to which, if possible, I must give effect. Following the two cases to which I have referred of *In re Mayhew* (5) and *In re Swinburne* (6), I do not think I am justified in saying that those words were put in merely in case the testator should thereafter be given some power of appointment which did not belong to him at the date at which he made his will. The word " appoint " is there, and I think the testator intended to exercise the power of appointment in favour of his son. I think that intention extends not only to the funds in the hands of the Public Trustee, but to the funds in the hands of the son as survivor of himself and the testator as trustees under the deed of May 21, 1929. I agree that if the son had predeceased the testator the substitutional gift to the son's issue could not have operated upon the trust fund by reason of the testator's partial release of his power, but I cannot see that there is any difference between a case in which the non-objects are brought in by way of substitutional

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(1) [1945] Ch. 21.
(2) [1913] 1 Ch. 510.
(3) [1899] 1 Ch. 563.
(4) (1885) 30 Ch. D. 172.
(5) [1901] 1 Ch. 677.
(6) 27 Ch. D. 696.

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gift and the case in which there are objects and non-objects mixed up as in the case of *In re Swinburne* (1). Although, as so many judges have said in this class of case, the dividing line may be narrow, and the guidance given by the authorities is none too easy to follow, I think, having regard to all the circumstances of the case, that the will did operate here to exercise both the powers of appointment which were vested in the testator at the time of his death.

It appears that the testator's business was that of a shipbroker. How far he remembered the contents of the deeds of 1927 and 1929 it is impossible to discover. It may be that he did remember them, or it may be that he did not remember them. I have to take the will as I find it, and I have come, not without hesitation, to the conclusion which I have already indicated.

Declaration accordingly.

Solicitors: *Thompson, Quarrell & Megaw; Raymond-Barker, Nix & Co.; Boodle, Hatfield & Co.*

(1) 27 Ch. D. 696.

I. G. R. M.

HARMAN J.

1949

May 6.

In re WOOD, DECD.

BARTON *v.* CHILCOTT.

Will—Gift to provide weekly sums for current "This Week's Good Cause" of the B.B.C.—Charity—Perpetuity—Uncertainty—Absence of cestui que trust.

A testatrix by her will made in 1938 directed her trustees to set aside a fund to provide 104*l.* per annum and out of that income to pay each week the sum of 2*l.* to the society on behalf of which an appeal should be transmitted on the Sunday from the National station of the British Broadcasting Corporation. The corporation had from 1926 broadcast an appeal each Sunday, from the National station for "The Week's Good Cause," which was not necessarily a charity in the legal sense. The testatrix died in September, 1946. From the beginning of that year an appeal had been broadcast from seven regional stations on three Sundays in the month, while different appeals had been broadcast on the remaining Sunday. It being conceded that the gift was not charitable in law :—

Held, that the gift failed for uncertainty, there being no cestui que trust which was certain, or which could be made certain by the directions of the testatrix.

In re Kelly [1932] I. R. 225 distinguished.

ADJOURNED SUMMONS.

The testatrix by her will dated June 22, 1938, directed her trustees to set apart a fund, described as "The B. B. C. "Trust Fund," sufficient to produce 104*l.* per annum to be held upon trust "out of the income of the investments thereof "to pay or cause to be paid each week the sum of 2*l.* towards "the Fund of the society, institution or body corporate or "incorporate on behalf of which an appeal shall have been "transmitted on the Sunday from the National station of the "British Broadcasting Corporation or other the body corporate "or incorporate authority or government department for the "time being exercising the functions now exercised by the "British Broadcasting Corporation. And I declare that if "by reason of alteration of existing arrangements or "circumstances it shall become impossible for my trustees "to carry out the foregoing trust provisions my trustees "shall apply the income of the said B. B. C. Trust Fund in "such manner as shall in the opinion of my trustees carry "out the objects of the trusts thereof as nearly as may be." It appeared from the evidence that the Corporation from 1926 had broadcast on each Sunday from the national transmitter an appeal for some deserving cause, commonly known as "The Week's Good Cause," and that they were guided in their choice of appeals by a committee of persons expert in social service matters, but that there was no rule that the objects must be charitable in the legal sense. The testatrix died on September 26, 1946, and as from the beginning of that year the Corporation discontinued the National transmission and broadcast the appeal from seven regional transmitters except on the first Sunday in each month, when separate appeals were made for different objects from different transmitters. The summons raised the questions whether the gift was valid, or void, or valid for twenty-one years from the death of the testatrix. It was admitted in argument on behalf of the representative "Good Cause" and the Attorney-General that the gift could not be held charitable in law.

Geoffrey Cross K.C. for the plaintiff.

D. H. McMullen for parties interested on the failure of the gift. The gift is wholly void. First, it offends against the rule against perpetuities. The possible interest of each "Good "Cause" is contingent week by week on the B. B. C. making an appeal. *In re Whiteford* (1) and *In re Johnson's Settlement Trusts* (2) illustrate the rule that it must be possible to ascertain at the death of the testatrix that a beneficiary must take an interest. Here there is nothing more than a probability as in *In re Lord Strathden and Campbell* (3). It is always possible that the B. B. C. may suspend appeals for a period of time exceeding the perpetuity period. Secondly, the gift is bad for uncertainty. In declaring this non-charitable trust, the testatrix has failed to indicate the beneficiaries, and has left it to others to fill in the gaps in her will.

J. A. Wolfe for the Distressed Gentlefolk's Aid Association a representative "Good Cause." This is a series of weekly gifts to a series of societies whose identity will from week to week be reduced to certainty. Such a gift is valid for twenty-one years, see the argument set out in Gray on Perpetuities, 4th ed., at p. 422 et seq., and the American cases there cited (*Siedler* v. *Syme* (4) ; *Lyons* v. *Bradley* (5)). In *In re Kelly* (6) a gift for the maintenance of the testator's dogs was held to be good for twenty-one years. There is no uncertainty, as that is certain which can be reduced to certainty.

Danckwerts for the Attorney-General.

D. H. McMullen in reply. *Lyons* v. *Bradley* (5) has been adversely criticized, see *Bundy* v. *U. S. Trust Co.* (7).

HARMAN J. It appears to be admitted that this gift is referable to a feature which has long been part of the B. B. C. programme on Sunday evenings, whereby a speaker makes an appeal on behalf of what is called "The Week's Good "Cause." It is clear from the evidence before me, and it was admitted, that "The Week's Good Cause" is not necessarily a charity. Therefore, this bequest cannot prevail on the footing that it is charitable. It was argued, nevertheless, that this was, in effect and in fact, a bequest of 2*l.* a week, week by week, and that it could be supported for a

(1) [1915] 1 Ch. 347.
(2) [1943] Ch. 341.
(3) [1894] 3 Ch. 265.
(4) 56 N. J. Eq. 275.
(5) 168 Ala. 505.
(6) [1932] I. R. 255.
(7) 257 Mass. 72, cited in Gray (supra).

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period of twenty-one years as not being obnoxious to the rule against perpetuities, which it was admitted would apply to it after that date.

There has been an interesting argument on the question of perpetuity, but it seems to me, with all respect to that argument, that there is an earlier obstacle which is fatal to the validity of this bequest, namely, that a gift on trust must have a cestui que trust, and there being here no cestui que trust the gift must fail. A testator cannot leave it to another to make a will for him, as Lord Haldane pointed out in *Houston* v. *Burns* (1), except in the case of a gift to a charity, which this is not. A testator cannot simply say: "I give part "of my estate to the British Broadcasting Corporation if and "when they decide on any Sunday during the next twenty-one "years to issue an appeal on behalf of some cause or another "and I am willing to leave to them the entire discretion "as to which cause it is." There is no cestui que trust here, and the gift must fail on that ground.

I have been referred to a number of cases on the question of perpetuity, and to a work for which I have the very greatest respect, Mr. Gray's book on perpetuities. At para. 410 (*a*) of the third edition, on p. 359, 4th ed. p. 422, he argued thus: "Suppose "property is devised to trustees in trust to pay the income "to a class of persons forever (or for a period exceeding twenty-"one years). If there be no requirement as to the time "when the income shall be paid, as it may not be paid over "till a too remote period, the whole trust is void. But "suppose there is a direction that the annual income shall be "paid over annually to those who on a certain day in each "year answer a particular description, for example, to those "who shall then be the heirs of the testator. What then? "Such trust is clearly bad as a whole. Is it good for twenty-"one years?" and the learned author seems to argue that it is. But there must be during the twenty-one years in question persons who are heirs of the testator. Here there is no class and there is no certainty. It is assumed that the British Broadcasting Corporation will continue this feature, and secondly, that it will name some particular institution as the good cause in question. It appears in fact that there is one Sunday in the month during which seven good causes are named in different parts of the country. Of which of them can it be said that it is the cestui que trust?

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(1) [1918] A. C. 337, 342.

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The same principle is illustrated in *In re Kelly*, (1) where a gift to maintain the testator's dogs was held good for a period of twenty-one years, but the learned judge was very careful to say that the point as to the absence of a cestui que trust was not taken before him and he did not think, as he said, that the parties were bound to take a point if they did not wish to. Therefore, all the rest of the reasoning, as he said very carefully, was only dealing with what he called the perpetuity point. He quite plainly hinted that a dog could not be a cestui que trust. There was not a cestui que trust, and if that point had been taken the gift must have failed, so that the case is no authority against the view which I am putting forward.

I hold that this gift is bad because it is wholly uncertain and has no object, no cestui que trust, which is either certain or can be made certain by the directions which the testatrix has given. It can be only made certain by the decision of some third party. That is a delegation of testamentary power which, except in the case of a charity, is not permitted. Consequently, I hold that the whole of this bequest fails.

Declaration accordingly.

Solicitors: *Lovell, Son and Pitfield for H. W. Dibben and Co., Wimborne; Watson, Sons and Room; Treasury Solicitor.*

F. R. D.

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(1) [1932] I. R. 255.

VAISEY J.

1949

Mar. 10.

In re GUNTER'S SETTLEMENTS.

OWEN *v.* PRITCHARD-BARRETT AND OTHERS.

Settlement—Life interest—Remainder "upon trust for all the children "of the settlor . . . . other than an eldest son . . . . entitled "for the time being under [the settlor's] will to his real estates "for . . . . life"—Eldest son's succession to real estates—Death of eldest son before tenant for life under settlement—Whether excluded.

By a settlement made in 1901 it was provided that in the event of the life tenant thereunder dying without issue the trust funds should then be held "upon trust for all the children of the said "R. G. [the settlor] (other than an eldest son or only surviving "son or an eldest or only surviving daughter entitled for the time "being under his will to his real estates for his or her life) who "being a son or sons shall attain the age of twenty-one years "or being a daughter or daughters shall attain that age or marry "in equal shares." The settlor died in 1905. Under his will his eldest son N. G. became entitled to the settlor's real estate for life. N. G. died in 1917. The life tenant under the settlement died in 1942 without ever having been married.

Held that N. G., by having become entitled in possession for his life under the settlor's will to the real estates, was effectively excluded by the excepting words in the settlement from the class of children entitled to participate in the distribution of the settled funds.

In re Leeke's Settlement Trusts [1937] Ch. 600 applied.

ADJOURNED SUMMONS.

By a settlement dated June 11, 1901, certain funds were settled by Sir Robert Gunter upon trust for one of his daughters, Ursula Fanny Gunter, for life with remainder to her issue as therein mentioned; but if she were to die without issue then "upon trust for all the children of the said Sir Robert "Gunter (other than an eldest son or only surviving son "or an eldest or only surviving daughter entitled for the "time being under his will to his real estates for his or her "life) who being a son or sons shall attain the age of twenty-one "years or being a daughter or daughters shall attain that age "or marry in equal shares."

By a declaration of trust of May 12, 1904, certain further investments were settled by reference to the trusts of the original settlement. Sir Robert Gunter, by his will dated June 2, 1905, devised all his real estate, subject to certain rent charges and life insurance premiums, to his eldest son Nevill Gunter for life without impeachment of waste, and after the death of Nevill Gunter to each of his sons according to seniority with remainders over in the usual form of a strict settlement. Sir Robert Gunter died on September 18, 1905. He had seven children, other than a child who was dead at the date of the settlement. His eldest son, afterwards known as Sir Nevill Gunter, succeeded as tenant for life to the real estate under the will. Sir Nevill Gunter died on August 20, 1917, and was in turn similarly succeeded by his son. The latter was alive when Ursula Fanny Gunter, the life tenant of the settlement funds, died on May 27, 1942, without ever having been married. The question raised by the summons was whether in the events which had happened the class of children amongst whom the settled funds were to be divisible included Sir Nevill Gunter, deceased.

E. G. Wright for the plaintiff, one of the trustees of the settlements.

J. F. Bowyer for the first defendant, representing the estate of Sir Nevill Gunter. Nevill Gunter should not be excluded from the class of children entitled to share in the distribution of the settled funds at the death of the life tenant thereof. The words "entitled for the time being" should be construed according to their natural meaning: *Law Union & Crown Insurance Co.* v. *Hill* (1). On the plain language of this instrument those words mean a person or persons entitled to possession of the real estate at the actual date of the distribution of the settled funds: see *Ellison* v. *Thomas* (2). At that date Nevill Gunter was dead and was not therefore entitled "for the time being" to the real estate within the meaning of the exception clause. Therefore neither he nor his estate should be excluded. [Counsel referred to *Reid* v. *Hoare* (3) and *Collingwood* v. *Stanhope* (4).]

I. J. Lindner for remaining defendants entitled to participate in the settlement funds. The question is whether or not the words "entitled for the time being" in this settlement mean the specific date of distribution of the settled funds. It is submitted that in this particular clause they mean that a son (or daughter) who becomes entitled in possession at any time to real estate under the settlor's will should be excluded: *In re Leeke's Settlement Trusts* (5). There is authority that an exclusion clause should be construed liberally, so that those who have already taken a benefit should be excluded. For the exclusion to apply it is not necessary that the person to be excluded should enjoy an estate in possession in the realty at the date of the distribution, but only that he should at some time have been entitled to such an estate: per Simonds J. in *In re Leeke's Settlement Trusts* (6). It is submitted that this case falls within *In re Leeke's Settlement Trusts* (5) rather than *Law Union & Crown Insurance Co.* v. *Hill* (1) or *Ellison* v. *Thomas* (2). The last two cases were not referred to in the case before Simonds J. In *Law Union & Crown Insurance Co.* v. *Hill* (1), Lord Halsbury L.C. meant that the instrument should be looked at as a whole. Accordingly Nevill Gunter, by having become entitled in possession for life of real estates under the settlor's will, should be excluded from the distribution of the settled funds.

(1) [1902] A. C. 263, 265, 267.
(2) (1862) 1 De G. J. & S. 18.
(3) (1884) 26 Ch. D. 363, 369.
(4) (1869) L. R. 4 H. L. 43.
(5) [1937] Ch. 600.
(6) Ibid. 605.

VAISEY J. stated the facts and continued: The question that I have to decide is whether or not, upon the true construction of the settlement and in the events which happened, the class of children of the settlor amongst whom, on the death of the tenant for life Ursula Fanny Gunter, the trust funds were to be divisible included Sir Nevill Gunter.

I turn back to the excepting words. All the children of Sir Robert Gunter, the settlor, are to participate subject to their attaining twenty-one, or, in the case of the daughters, attaining that age or marrying, with the exception of the eldest son or only surviving son or only surviving daughter entitled for the time being under the settlor's will to his real estates for his or her life. What would have happened if the tenant for life had died in the lifetime of his father is a question which has not arisen and on which I need express no opinion. I think that the excepting words have to be read, in the events which have happened, as omitting the references to "surviving "son or an eldest or only surviving daughter," because Sir Nevill Gunter left, as I understand it, male issue who have succeeded to the estates under the will, so that no son other than Sir Nevill Gunter ever became entitled at any time under the settlor's will for life to his devised real estate. Omitting the words which appear to me to be irrelevant, the person or persons excepted from the trust is or are the persons who come within the description of an eldest son, etc., entitled for the time being under the will to the settlor's real estates for his life. One thing is clear. If I read the words "for the time being" in the natural sense in which those words prima facie would have to be read in a case of this description, they would refer obviously to the point of time which is mentioned; that is to say, the date of the decease of the tenant for life, Ursula Fanny Gunter. The funds have to be held after her decease in trust for all the children other than the eldest son entitled for the time being under his will to his real estates for his life.

There is a somewhat bewildering mass of authority on this type of problem, and certain authorities have been cited to me by counsel—*Ellison* v. *Thomas* (1); *Law Union & Crown Insurance Co.* v. *Hill* (2); and *In re Leeke's Settlement Trusts* (3) I confess that I find those authorities difficult to reconcile, and I think—in fact I am convinced—that if a larger number

(1) 1 De G. J. & S. 18.

(2) [1902] A. C. 263.

(3) [1937] Ch. 600.

of authorities had been cited to me than those three, to which alone I propose to refer, I should have found even greater confusion as between the various decisions to which the courts in dealing with this type of problem have come.

There is no doubt that the case of *Ellison* v. *Thomas* (1) is extraordinarily near to the present case. The head-note of that case reads: "By a settlement, a sum of money was "directed to be raised after the death of the survivor of two "persons, and be held in trust for all the children of the tenant "for life of hereditaments settled by a contemporaneous "deed other than and besides an eldest or only son for the "time being entitled under the last-mentioned settlement "to the estates thereby settled in possession or in remainder "immediately expectant on the decease of the survivor of "the tenant for life and a prior tenant for life. *Held* that the "exclusion applied only to the person who was the eldest "son at the time appointed for raising the money, and that "the representatives of an eldest son who had died before "that period were entitled to participate in the money."

The second case, the *Law Union & Crown Insurance Co.* v. *Hill* (2), was a case where the excepting words were "other "than and except an eldest or only son for the time being "entitled to the possession" of certain estates after the decease of a named person "as tenant for life or any greater estate or "interest whatsoever." The named person and the eldest son being then respectively tenant for life and tenant in tail in remainder of the estates executed deeds under which the estates were disentailed and sold and the proceeds invested by the trustees under the trust under which the son took a beneficial interest. The testator died in 1875, and the named person, Richard, died in 1899. It was held "that Richard's "eldest son was not at his father's death 'entitled' to the "rents, etc., of the . . . . estates within the meaning of the "exception clause, and was therefore not excluded from the "succession to the testator's estates." It is somewhat remarkable that no reference was made in that case to *Ellison* v. *Thomas* (1). It is even stranger that in the last of the three cases, *In re Leeke's Settlement Trusts* (3) before Simonds J. neither of the two cases which I have already mentioned appears to have been cited or referred to. It may well be that before Simonds J. a similar discretion was exercised by the learned counsel who argued the matter in selecting only a few of the many authorities which were undoubtedly material for the consideration of the court.

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(1) 1 De G. J. & S. 18.
(2) [1902] A. C. 263.
(3) [1937] Ch. 600.

But I do find in the judgment of Simonds J. in *In re Leeke's Settlement Trusts* (1), some observations which appear to me to be helpful in reaching the conclusion which I have to reach in this present case. Simonds J. in referring to the speech of Lord Hatherley in *Collingwood* v. *Stanhope* (2), quoted these words: " The court, with regard to all questions arising " on provisions for children under a marriage settlement, holds " that the principal intent to be imputed to the parties " (however differently that intent may be expressed, so long " as it is not contrary to what is actually found in the " settlement) is a desire to provide equality for the children, " that one child should not take a double portion, and that " no child should be excluded. So it is that, though an " ' eldest ' son or an ' elder ' son is by the terms of a settlement " excluded from portions and a certain son has in nature " that character, yet he is not excluded if he does not in fact " succeed to the settled estates, for in such a context, as " Lord Hardwicke said in *Duke* v. *Doidge* (3): ' Eldership " ' not carrying the estate along with it is considered not such " ' an eldership as shall exclude '." Later in his judgment, Simonds J. said this: " I have, in examining the general " principles according to which the court construes an exclusion " clause, used a loose expression, ' succeeds to the estates,' " which at that stage of my consideration was accurate enough. " But it is now necessary to examine more closely what are the " circumstances which, when the date of distribution arrives, " enables one to say of a child that he has or has not or had " or had not such an estate as to exclude him from portions. " It is, for instance, clear that it is not necessary, in order that " he may be excluded, that he should in fact enjoy an estate " in possession in the settled estates at the date of distribution. " It is sufficient, as Lord Westbury pointed out in *Collingwood* " v. *Stanhope* (2), that the person who is to be excluded should " at some time have been entitled to the estate." Then quoting Chitty J. in *In re Fitzgerald's Settled Estates* (4) he said this: " it is sufficient to exclude him if being then " entitled to an estate in remainder he has with the assistance " of his father, the tenant for life, procured for himself out

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(1) [1937] 1 Ch. 600, 604, 605.

(2) L. R. 4 H. L. 43.

(3) (1746) 2 Ves. Sen. 203.

(4) [1891] 3 Ch. 394.

" of the settled estates a benefit exceeding any share of portions " which could come to him." In that case the excluded person had, so to speak, an estate in futurity which excluded him from sharing in the portions.

In the present case, of course, Sir Nevill Gunter's life estate had long come to an end when the tenant for life under the settlement died. The problem is this: Whether I must read it as meaning " the eldest son entitled at the death of the tenant for life under the settlor's will to his real estates " for his or her life," or whether I must read it as meaning " the eldest son who under the provisions of the will had been " for a time entitled for his life to the real estates settled " by the settlor's will." With considerable hesitation I have come to the conclusion that by having become entitled for a time under the will to the settlor's real estates for life, Sir Nevill Gunter is effectively excluded by the excepting words from the class of children who were entitled in remainder under the terms of the will. It seems to me that I have really ample authority for deciding this case either way. But looking, as I think Simonds J. invites me to do in *In re Leeke's Settlement Trusts* (1), at the reasonable and probable purpose and intention of this excluding clause, I think the more reasonable view to take is that the children who were to participate in this fund were a class exclusive of any one of them who had in the past or who was at the time entitled to a life estate in the real estates, and that in consequence I must answer the question which I am asked in the summons by declaring that " On the true construction of the settlement " and in the events which have happened the class of children " did not include the late Sir Nevill Gunter, but that those " who are entitled to participate in the funds are the children " other than the child deceased at the date of the settlement " and other than Sir Nevill Gunter himself."

Declaration accordingly.

Solicitors: *Frere, Cholmeley & Nicholsons*; *Fisher, Dowson & Wasbrough*; *Steavenson & Couldwell.*

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(1) [1937] Ch. 600.

I. G. R. M.

Distinguished. Re GARTSIDE. [1949] 2 All E.R. 546.   *Reversed.* C.A. [1949] 2 All E.R. 774.

Varied. *In re* KELLNER'S WILL TRUSTS 1950, 1 Ch. 46

In re KELLNER'S WILL TRUSTS.
In re NATIONAL HEALTH SERVICE ACT, 1946.
BLUNDELL *v.* ROYAL CANCER HOSPITAL.

HARMAN J.

1949

Apr. 27 ; *May* 11

Will—Gift of residue to teaching hospital—Death of testatrix before coming into operation of Part II of the National Health Service Act, 1946*—Hospital taken over by State before probate granted—Construction of Act—Jurisdiction—No provision in Act for charitable legacies—Legacy to be applied cy-près—National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 6, *sub-s.* 1 ; *s.* 7, *sub-ss.* 1, 10 ; *s.* 60, *sub-s.* 1.

A testatrix by her will dated June 18, 1948, gave a share of residue to a teaching hospital. She died on June 23, 1948. On July 5, 1948, Part II of the National Health Service Act, 1946, came into operation, whereby the hospital was taken over by the State. Probate of the will was granted on July 31, 1948. A summons was taken out by the trustee of the will to determine whether the legacy (1.) vested in the Minister of Health under s. 6 of the Act, or in the Board of Governors of the hospital under s. 7 ; (2.) should be applied by the trustee of the will to the purposes of the hospital under s. 60 ; (3.) should devolve as on an intestacy ; (4.) should be administered under some other and what trust.

Held, (1.) that having regard to the proviso to s. 7, sub-s. 10, the interest in the share could not be deemed to be an endowment within the meaning of s. 7 and consequently did not vest thereunder in the Board of Governors ; (2.) that since the benefit of a right to a share of an unadministered estate was not a "right" within the meaning of s. 6, sub-s. 1, it did not vest thereunder in the Minister of Health ; (3.) that since the word "property" as used in s. 60, sub-s. 1, did not include rights the trustee could not be required thereunder to apply the trust property to the purposes of the Board of Governors ; and (4.) (following *In re Slevin* [1891] 1 Ch. 373) that the legacy did not lapse and, in default of any provision for such legacies in the Act, should be administered by the Crown under the Sign Manual.

Held, further, that the provisions for arbitration contained in Part II of the Act did not oust the jurisdiction of the court.

ADJOURNED SUMMONS.

The testatrix by her will dated June 18, 1948, bequeathed the residue of her estate to the plaintiff, her trustee, upon the statutory trusts for realization and directed him to divide the nett proceeds of realization into eight shares and pay one such share to the Royal Cancer Hospital and another to the Cancer Research Institute. She died on

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

HARMAN
J.

1949

KELLNER'S
WILL
TRUSTS,
In re.

NATIONAL
HEALTH
SERVICE
ACT, 1946,
In re.

BLUNDELL
v.
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HOSPITAL.

June 23, 1948. On July 5, 1948, Part II of the National Health Service Act, 1946 (1), came into operation, whereby the hospital and the institute came under the control of a Board of Governors constituted under the Act, and were taken over by the State. Probate of the will was granted on July 31, 1948. By this summons the trustee of the will asked whether the legacy (1.) vested in the Minister of Health under s. 6 of the Act or in the Board of Governors of the hospital under s. 7; (2.) should be applied by the trustee to the purposes of the hospital under s. 60; (3.) should devolve as on an intestacy; (4.) should be administered under some other and what trust.

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(1) National Health Service Act, 1946, s. 6, sub-s. 1: "Subject "to the provisions of this Act, "there shall, on the appointed "day, vest in the Minister . . . . "all interests . . . . being in"terests held immediately before "the appointed day by the "governing body of the hospital "or by trustees solely for the "purposes of that hospital, and "all rights and liabilities to "which any such governing body "or trustees were entitled or "subject immediately before the "appointed day, being rights "and liabilities acquired or "incurred solely for the purposes "of . . . . carrying on the "business of the hospital . . . . "but not including any endow"ment within the meaning of "the next following section or "any rights and liabilities trans"ferred under that section."

Section 7, sub-s. 1: "Where "any voluntary hospital to which "the last foregoing section applies "is, before the appointed day, "designated by the Minister ". . . . as a teaching hospital ". . . . all endowments of the "hospital held immediately before "the appointed day shall on "that day . . . . be transferred "to and vest in the Board of "Governors constituted under this "Act for the teaching hospital."

Sub-section 10: "In this sec"tion the expression endowment, "in relation to a voluntary "hospital, means property held "by the governing body of the "hospital, or by trustees solely "for the purposes of that hospital, "being property of the following "descriptions . . . . "Provided that an equitable "interest held for the purposes "of a voluntary hospital in trust "property in which there are "other equitable interests shall "not be deemed to be an endow"ment of that hospital."

Section 60, sub-s. 1: "Where "property, other than property "transferred to the Minister or "to the Board of Governors of "a teaching hospital . . . . under "s. 6 or s. 7 of this Act, is held "on trust immediately before "the appointed day, and the "terms of the trust instrument "authorise or require the trustees, "whether immediately or in the "future, to apply any part of "the capital or income of the "trust property for the purposes "of any hospital to which s. 6 "of this Act applies, the trust "instrument shall be construed "as authorising or . . . . requir"ing the trustees to apply the "trust property . . . . for the "purpose of making payments, "whether of capital or of income ". . . . to the Board of Governors "of that teaching hospital."

J. A. Armstrong for the plaintiff trustee. Notwithstanding the arbitration provisions in Part II of the Act, the court has jurisdiction. In *Norwich Corporation* v. *Norwich Electric Tramways Co. Ld.* (1), the jurisdiction was ousted because the legislature had appointed a special tribunal for the settlement of such disputes. But here the court is ready to determine questions of law notwithstanding references to arbitration, so that the arbitrator may be compelled to state a case. A party to an arbitration has a right to seek the directions of the court on questions of law: see the Arbitration Act, 1934, s. 9. The legislature could not have intended to exclude by a side wind the right of an executor or trustee to seek the directions of the court. The fact that a declaration by the court would have to await the setting up of a tribunal is an indication that there was no intention to oust the jurisdiction. [He referred to the dissenting judgment of Cozens-Hardy L. J., in *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co. Ld.* (2).] Here the class of reference to arbitration is permissive rather than mandatory.

Ungoed-Thomas K.C. and *H. E. Francis* for the Board of Governors of the Royal Cancer Hospital. Section 60 or s. 7 applies so as to transfer the interest to the Board of Governors. Section 60 is subject to ss. 6 and 7, and s. 6 to s. 7. The last part of s. 6, sub-s. 1, is so worded as to exclude any interest covered by s. 7. It is immaterial whether s. 60 or s. 7 applies; s. 6 does not apply; it was the intention of the testatrix to benefit the hospital, and the scheme of the Act is to preserve the intention of a testator. The Board was set up to manage and hold resources which s. 7 vests in the Board for the purposes of the hospital. The rights here in question are held solely for the use of the hospital; what is contemplated in s. 7, sub-s. 10, is some stable form of property which would include the interest in this will.

Danckwerts for the Minister of Health and the Attorney-General. The Ministry is not interested to defeat the claim of the Board of Governors. Sub-section 10 of s. 7 cannot apply to the present case. The definition of endowments therein is strict and narrow; the draftsman was contemplating

(1) [1906] 2 K. B. 119.

(2) [1904] 2 Ch. 123, at p. 150 and [1905] A. C. 421.

specific kinds of property, as in paras. (*b*), (*c*) and (*d*). Moreover, the proviso prevents this interest from being deemed to be an endowment; it is an equitable interest in trust property. It is not caught by s. 7, but by s. 60 or s. 6. Under sub-s. 1 of s. 6, rights required for the purposes of managing and carrying on a hospital vest in the Minister; prima facie that should include the interest here in question.

Tonge for the next-of-kin of the testatrix.

Cur. adv. vult.

May 11. HARMAN J., having stated the facts, continued: When the testatrix died on June 23, 1948, at that date no difficulty or doubt could have arisen about the destination of the two shares of residue to which I have referred. The Royal Cancer Hospital (Free) was the well-known hospital carried on in the Fulham Road under that name. It was incorporated by Royal Charter in the year 1910. Besides the hospital it owned and controlled a research institute housed in the old Freemasons Hospital in the Fulham Road. This was conducted under its own directors and staff and was commonly known as The Cancer Research Institute. It was manifestly the object of the testatrix's bounty to the extent of one-eighth of her residue. Before probate of the will was obtained there was brought into force by Order in Council Part II of the National Health Service Act, 1946, the appointed day being July 5, 1948. Under this part of the Act broadly speaking the hospitals of the country and their property were taken over by the State. The control of hospitals differs according to whether they were or were not designated by the Minister under s. 11, sub-s. 8, of the Act as teaching hospitals. Such a designation was in fact made in the case of The Royal Cancer Hospital (Free) and as a result a board of governors constituted in accordance with Part 3 of sch. III. to the Act has been since the appointed day conducting the affairs of the hospital and of the Cancer Research Institute in obedience to s. 12, sub-s. 3, and s. 16, sub-s. 2, of the Act. The first defendants, the Board of Governors, claim the benefit of the testatrix' bounty. Now bequests of legacies or shares of residue in favour of hospitals are, or were until the springs of charity were dried by a crippling taxation, the commonest form of charitable bounty, and I confess that I approached the problem here posed in the confident expectation that

I should find direct guidance in the Act as to the destination of such gifts. It was indeed with some surprise that I heard that conflicting claims were preferred by the Board of Governors, by the Minister of Health, by the Attorney-General and by the next-of-kin.

My attention was drawn by counsel, section by section, to the provisions of the Act, and I read them with a bewilderment which ripened finally into dismay when the conclusion was forced on me, from which I see no escape, that by some mischance the legislature has so framed the sections of this Act as to leave outside it charitable legacies of the nature here in question. The Act in this respect is almost a miracle of ineptitude. I propose to examine it to show how I have been driven to the melancholy conclusion to which I have referred: if I am right this is indeed an extraordinary instance of casus omissus.

Before I deal with the sections under which the conflicting claims are made, I must dispose of a suggestion, properly made to me, that the Act has provided a statutory form of arbitration for the resolution of the type of question with which I am confronted and has thus ousted the jurisdiction of the court. That an arbitration clause in a statute may have this effect is illustrated by the case of *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.* (1). It would be a further surprise to find that the legislature has, by what would seem to be an inadvertence, shut out the hospitals from access to the courts on questions of construction of the Act, but that result if it emerges from the language used must be accepted. Part II of the Act with which I am here concerned contains a number of provisions for arbitration; thus ss. 6 and 7, which are the main sections effectuating the transfer of hospital assets to the State, both contain arbitration provisions, but both of these broadly speaking are framed to decide questions of apportionment between assets partly transferred and partly not, and they have no bearing on the present question. Section 9, however, which is described as containing " Supplementary provisions relating " to transfer of hospital property and liabilities," contains the following sub-section: " (8.) Regulations may make " such provision supplementary to or consequential on the " foregoing provisions of this Part of this Act relating to the " transfer of property and liabilities as appears to the Minister

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(1) [1904] 2 Ch. 123, and [1905] A. C., at p. 421.

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" to be necessary or expedient, and in particular, but without " prejudice to the generality of this sub-section, regulations " may provide—(*a*) for the determination by arbitration, in " default of agreement, of any question arising as to whether " any property or liability will be or has been transferred under " the said provisions or as to the person to whom it will be " or has been transferred." The language of sub-para. (*a*) seems appropriate to the present question, but the provision to be made by the regulations must be " supplementary to " or consequential on " ss. 6 and 7, thus limiting questions which can be dealt with by regulation to matters ancillary to the sections. This pre-supposes that the property in question is of a nature coming within the transfer sections if owned by a hospital of one of the kinds indicated. It does not in my judgment extend to questions as to the meaning and effect of the sections themselves. In other words the subject-matter of an arbitration under the regulations must be fact and not law. I hold, therefore, that the jurisdiction of the court is not ousted, and I need not consider the regulations made by the Minister under the section (Statutory Instrument, 1948, No. 888) beyond saying that No. 30 of these regulations, if and so far as it purports to refer to arbitration the type of question which I have here to determine, is ultra vires.

I now turn back to the main question and first deal with s. 7 on which the first defendants mainly rely. [His Lordship read sub-s. 1 of s. 7 and continued :] If then this be an endowment the first defendants are right. That word is explained under s. 7, sub-s. 10, in these terms : " In this " section the expression ' endowment,' in relation to a voluntary " hospital, means property held by the governing body of the " hospital or by trustees solely for the purposes of that hospital, " being property of the following descriptions—(*a*) interests in or " attaching to land "—I need not read any further ; then " (*b*) shares, stocks, bonds, debentures and other securities, " and any other personal property held by way of an " investment ; (*c*) money, including any credit in a banking " account ; (*d*) rights under any bill of exchange, promissory " note or gratuitous covenant for the payment of money : " Provided that an equitable interest held for the purposes " of a voluntary hospital in trust property in which there " are other equitable interests shall not be deemed to be an " endowment of that hospital."

By s. 79, unless the context otherwise requires, the word "property" includes rights. Now the rights of the residuary legatee are rights to have the estate of the testatrix administered according to law, either by the personal representatives or by the court, and on completion of the administration to have the balance remaining in the executors' hands distributed in due proportions. A residuary legatee, while the estate remains undistributed, has no right to any particular asset or item of property, but merely an equitable interest in the estate of the nature I have mentioned.

It seems to me that the Cancer hospital's right as one of the residuary legatees is an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests, and, if so, the proviso expressly excludes this interest from the category of endowments. Even if that be not so, I cannot find any words in sub-s. 10 which could cover this share. It was suggested that this is "personal property held by way of investment," but that it clearly is not, and there are no other words which are even faintly appropriate. It follows that I must hold that this section has no application. Before leaving it I should add perhaps that it contains one extremely odd feature in that provision is made for an endowment given after the passing of the Act and before the appointed day in the case of a non-teaching hospital, but omits a similar provision in the case of a teaching hospital. I cannot understand this caprice, but it is irrelevant, as I must hold this not to be an endowment. I turn back therefore to s. 6 under which the Minister of Health prefers his claim. If this succeeds the money will go to the Exchequer under s. 52, sub-s. 2, of the Act. [His Lordship read sub-s. 1 of s. 6 and continued :] Section 6, sub-s. 2, deals with the transfer of the property of hospitals vested in a local authority, but for some inscrutable reason entirely different language is used, though one would suppose that property of the same nature was being transferred in each case. It therefore affords no help. Section 6, sub-s. 1, starts by transferring interests in what is called by the inappropriate word "premises," by which I suppose immovable property to be meant. The section proceeds to deal secondly with movable property, and thirdly with rights, which include "rights acquired solely for the purpose of carrying on the "business of the hospital," but not including an endowment within s. 7.

It was suggested to me that if s. 7 did not apply, the words I have just quoted do catch this interest, but I cannot think that an interest in an unadministered residue can be described even in this Act as a right acquired for the purpose of carrying on the business of the hospital. Accordingly I reject this suggestion.

Thirdly it was suggested that if neither s. 6 nor s. 7 embrace the interest in question, it is yet caught by s. 60. This clause is to be found in Part VI of the Act, which is described as "General," and in a fasciculus of sections described as "administrative provisions." The side-note to s. 60 reads as follows: "Power of trustees to make payments to regional "hospital boards and boards of governors." This section therefore may be described as tabula in naufragio: it would clearly rescue the first defendants only by an accident. [His Lordship read the section and continued:] The context of this section requires that the word "property" should not here include rights, for that which is dealt with is something to be applied for the benefit of (among others) a board of governors. The rights vested in the board of governors here cannot be applied by someone else for their benefit. In this section therefore the expression "the trust property" means the residue of the estate and the question is whether the terms of the trust instrument (scilicet, the will) require the trustees (that is the plaintiff) to apply a part of the capital for the purposes of The Cancer Hospital. In my judgment this language is wholly inappropriate, and the section has nothing to do with the case.

What then is to happen to this bequest? Is it undisposed of and payable therefore to the next-of-kin? I cannot think so. When the testatrix died there was in existence a charity identifiable as the object of her bounty, and capable of taking advantage of her bequest. The fact that this charity has ceased to exist, as in fact it has under s. 78, sub-s. 1 (*c*), of the Act, cannot bring about a lapse, on the ordinary principle that there can be no lapse where the legatee survives the testator. The principle is clearly stated in the well-known case of *In re Slevin* (1). Accordingly I must hold that the next-of-kin have no rights, and that the bequest must be administered by the Crown under the Sign Manual.

Declarations and order accordingly.

Solicitors: *Blundell, Baker & Co. for the plaintiff; Farrer & Co. for the Board of Governors; Vandercom, Stanton & Co. for the next-of-kin; the Solicitor to the Ministry of Health; the Treasury Solicitor.*

(1) [1891] 1 Ch. 373.

KENNEWELL *v.* DYE.

ROX-
BURGH
J.

1949

Mar. 17, 18.

Vendor and purchaser—Tenancy agreement—Option in agreement to tenant to purchase freehold subject to giving landlord three months' notice—Death of landlord—Notice by tenant to landlord's personal representative of intention to exercise option—Validity of notice.

An agreement made in April, 1923, between a landlord and his tenant provided: "The landlord . . . . lets and the tenant "accepts [the property] at the yearly rental of 15*l.* payable half "yearly commencing with the first payment of rent six months "from the date of the commencement of the tenancy which will "be arranged between the said [landlord] and the said [tenant] ". . . . Signed by the parties hereto in the presence of [witness]. "Signed [landlord] [tenant]." There followed: "It is further "hereby agreed and declared that the said [landlord] will sell "to the said [tenant] the property for the sum of 350*l.*; subject "to the said [tenant] giving to the said [landlord] three months' "notice of his intention for so doing. Signed by the parties "hereto [landlord] [tenant]. Witness [signature of same "witness]." In June, 1923, the tenant, pursuant to a contract antecedent to or collateral with that of April, 1923, conveyed to the landlord for 350*l.* the premises comprised in the agreement of April, 1923, of which the tenant had himself been the legal tenant in fee simple. In June, 1947, the landlord died and in the following November the tenant gave to the landlord's personal representative notice in writing of his intention to exercise the option to re-purchase. The landlord's personal representative did not carry out the agreement for re-sale. In an action for specific performance of the agreement, the tenant contended that the landlord had agreed, as part of the consideration for letting the property to him, to sell the property to him for 350*l.* subject to his giving the landlord three months' notice of his intention to buy it; and alternatively that the consideration for the grant of the option was, in addition to that agreement, the tenant's sale, completed by the conveyance of June, 1923, of the property to the landlord. The tenant—whose evidence alone was available, the witness to the agreement having died—said that the whole document was in existence before he signed it and that, so far as he could remember, he put his signature to it twice on the same occasion. The landlord's personal representative contended that the tenant's recollection—though not his good faith as a witness—was at fault and that in the agreement the clause with the option was an addition made after the earlier parts of the agreement, so that there was no consideration for the option. She conceded that if that clause was signed on the same occasion as the rest of the agreement there was consideration, but she further contended that the option could not be exercised after the death of the grantor, the landlord.

Held, in declaring that the plaintiff was entitled to specific performance, (I.) that the whole document was executed on the same occasion and that accordingly any contest as to consideration disappeared ; (2.) that the burden of the option would be prevented from falling on the landlord's personal representative only if the court held (which it did not) that it was not intended so to do, or if the contract was personal to the grantor (the landlord) which it was not, since the landlord's obligation to convey the property and the tenant's to pay the purchase money could readily be performed vicariously ; (3.) that where, as in the present case, the burden of a covenant devolved on a personal representative, notice which the contract or covenant required to be given to the deceased could, and ought to, be given to his personal representatives.

Statement of the law in Williams on Executors, 12th ed., at p. 1126 considered.

Harwood and Bincks v. *Hilliard* (1677) 2 Mod. Rep. 268, followed.

ACTION by plaintiff for specific performance of a contract for the sale of freehold property which the plaintiff claimed to have purchased in exercise of an irrevocable option which he alleged to have been given to him by the defendant's predecessor in title, the original landlord. By an agreement dated April 26, 1923, and made between the landlord and the tenant (the plaintiff) it was provided: "The landlord . . . . lets and "the tenant accepts [the property] at the yearly rental of "15*l.* payable half yearly commencing with the first payment "of rent six months from the date of the commencement "of the tenancy which will be arranged between the said "[landlord] and the said [tenant] . . . . Signed by the "parties hereto in the presence of [witness]. Signed [landlord] "[tenant]." There followed: "It is further hereby agreed "and declared that the said [landlord] will sell to the said "[tenant] the property for the sum of 350*l.* ; subject to the "said [tenant] giving to the said [landlord] three months' "notice of his intention for so doing. Signed by the parties "hereto [landlord] [tenant]. Witness [signature of same "witness]." By a conveyance dated June 27, 1923, and made between the plaintiff (the tenant) and the landlord, the plaintiff, in pursuance of a contract antecedent to or collateral with that of April 26, 1923, conveyed to the landlord for 350*l.* the premises comprised in the last mentioned agreement of which he (the plaintiff) had theretofore been legal tenant in fee simple. On June 24, 1947, the landlord died. On November 24, 1947, the plaintiff gave to the defendant (the landlord's personal representative) notice in writing of his intention to exercise the option to re-purchase.

The defendant did not carry out the agreement for re-sale to the plaintiff which, the latter alleged, came into being by virtue of his notice under the option to the defendant. By his statement of claim the plaintiff pleaded that, as part of the consideration for the letting of the premises to the plaintiff, the landlord agreed to sell to the plaintiff the premises for the sum of 350*l*., subject to the plaintiff's giving to the landlord three months' notice of his intention of buying them: alternatively, that the consideration for the grant of the option was, in addition to that, the sale of the premises by the plaintiff to the landlord which was completed by the conveyance of June 27, 1923. At the date of the hearing the witness to the agreement was dead and the only evidence available was that of the tenant. He stated in the witness box that, although his signature appeared twice, the whole of the document had been typed before he wrote either signature and that, so far as he could remember, he wrote both signatures on the same occasion.

Jopling for the plaintiff, the tenant. The tenant's notice to the landlord's personal representative of his intention to exercise the option is quite in order and is a good notice. The landlord's personal representative, on the other hand, has not carried out her part of the agreement for re-sale of the property, which she was bound to do after the notice of the intention to exercise the option had been given, and is therefore in breach. Accordingly, the tenant is entitled to specific performance of that agreement.

R. C. Vaughan K.C. and *Nigel Robinson* for the defendant, the landlord's personal representative. There is every indication that the agreement of April 26, 1923, is in two parts and that the second part—the clause with the option—was executed after the first. The type of that clause is different in quality from that of the first part and, if the whole document is in fact one, there can have been no reason why execution and attestation should not have come once only, right at the end, instead of being done twice. The fact that the clause with the option begins with the words "it is further "agreed" is not proof or even necessarily an indication that the clause was not added later. The tenant has doubtless given his evidence quite honestly and to the best of his recollection, but his recollection may well be at fault. On the footing that the clause with the option was in fact added later, there has been no consideration for the option and the purported grant of it is therefore invalid. If, however, the clause with the option was signed on the same occasion as was the rest of the agreement, there has been consideration. Even so, the option has not been validly exercised, for notice of intention to exercise it had to be given to the grantor, the landlord. That is what it says. It could not be given to the landlord, since he was dead: and giving it to his personal representative was not the same thing as giving it to him would have been. Thus, the tenant is not entitled to specific performance.

Jopling in reply. Just as there is no reason to doubt the tenant's good faith as a witness, so there is no reason to doubt his recollection of having signed both parts of the agreement on the same occasion. As to the contention that the option has not been validly exercised because the grantor of it was dead when the notice of intention to exercise it was given, the contract to sell the property on three months' notice "to the landlord" of intention to buy it was not personal to the landlord in the sense that only the landlord himself could carry out his part of it: see Williams on Executors, 12th ed., at p. 1126; all that he would have had to do would have been to convey the property, and his personal representative can do that just as effectively as he could have done it himself. Finally, as to the contention that notice to the landlord's personal representative is not notice to the landlord himself, who granted the option, if the court accepts the tenant's immediately preceding contention that the landlord's personal representative is bound to carry out the agreement for re-sale, it must follow that the notice of intention to exercise the option, which would have had to be given to the landlord had he been alive, must of equal necessity be given to his personal representative, since the giving of it is a sine qua non to the exercise of the option and there is no one else to whom it can be given: *Harwood and Bincks* v. *Hilliard* (1).

ROXBURGH J. Only two circumstances point to a later execution of the addendum (the clause containing the option). First, the type is certainly slightly fainter, but that, in my judgment, really does not prove anything, as it was undoubtedly added after the document was drafted. That, however, does not mean that it was added after the document was signed. It is contended that it need not have been so added if it had been agreed beforehand. The answer to that, however, seems to me to be that no doubt when the document was about to be signed, or possibly before that moment, somebody noticed that something had been left out and, rather than engross the whole document again, the parties executed the clause containing the option by way of addendum.

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(1) (1677) 2 Mod. Rep. 268.

In my judgment, there is no reason at all to think that the whole document, including the addendum, was not executed on one and the same occasion. One date—April 6, 1923, stated at the beginning—covers the whole. One stamp, dated April 13, 1923, covers the whole. Of course this clause could have been added after the document had been executed and stamped. I cannot see, however, why I should assume that it was; and I am prepared to hold that the matter is concluded by direct evidence. The plaintiff has given evidence in the witness box. The landlord and the witness to the agreement are both dead. It is, therefore, true to say that nobody could testify to the contrary. That, however, is not, in my view, ground for impeaching the plaintiff's evidence, which was given quite fairly and frankly, and which I accept. He said that the addition had been typed before he signed any part of the document and that, so far as he can remember both his signatures were placed on it at one and the same time; and examination of the signatures discloses no reason whatever to doubt that statement, which I accept. I attach some little importance to the fact that the words "it is "further agreed" appear, though it is true, as Mr. Vaughan pointed out, that that would be quite consistent with a further agreement made at a subsequent time. On the whole, however, I consider it more likely to mean that this is a further term of the whole bargain, and I so hold. Accordingly, the question of consideration disappears.

Next, it is said that this option, on its true construction, could not be exercised after the death of the grantor. I take the statement of the law on this subject from Williams on Executors, 12th ed., at p. 1126. It is as follows: "The executors "or administrators so completely represent their testator or "intestate, with respect to the liabilities above mentioned, "that every bond, or covenant, or contract with the deceased "(not being a contract personal to the deceased) includes them, "though they are not named in the terms of it; for the "executors or administrators of every person are implied

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"in himself." Therefore, it is not significant whether the words "executors or personal representatives" are or are not expressly used, except in this sense, that, of course if they are used, cadit quæstio.

Only two grounds, in my judgment, would prevent the burden of this option from devolving on the grantor's personal representative. First, it would not so devolve if I were to hold on its true construction that it was not intended so to do: but I find nothing in the document to induce me so to hold. Secondly, it would not so devolve if the contract was personal to the deceased, the grantor. Nothing in this case makes vicarious performance difficult on either side. The obligation on one side is to execute a conveyance, on the other, to pay some money—both of them readily capable of vicarious performance. Accordingly, there is no ground for holding that the burden of this option did not devolve on the grantor's personal representative. It is said, however, that the notice has to be given to the grantor, and that giving a notice to his personal representative is not giving it to him. In my judgment, that point is precluded by *Harwood and Bincks* v. *Hilliard* (1), a very old case which Mr. Jopling cited to me. The report, excluding the side-note, is as follows: "By an agreement between the plaintiffs and the testator of "the defendant, a parcel of lands was to be sold for 400*l.*; "but if it did not arise to so much, then they covenanted "with each other to repay proportionable to the abatement; "and the defendant's testator covenanted for himself and his "executors to pay his proportion to the plaintiffs, so as the "plaintiffs gave him notice in writing of the said sale by the "space of ten days; but doth not say that such notice was "to be given to his executors or administrators. And now "the plaintiffs averred, that they gave notice accordingly "to the defendant who was executor; and the breach assigned "was, that he hath not paid, etc. The defendant demands "oyer of the indenture, wherein was a variance between the "covenant (which was for notice to be given to the testator) "and this declaration (by which notice is averred to be given "to the executor); and for this reason he demurred. . . . . "The Chief Justice and Atkins J., upon the first opening "this matter this term"—the Michaelmas Term in the twenty-ninth year of the reign of Charles II.—"inclined that "the notice ought to be personal, and that the variance was

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(1) 2 Mod. Rep. 268.

"material; but afterwards in Hilary term following, mutata "opinione, the whole court agreed it to be otherwise, because "the covenant runs in interest and charge, and so the executor "is bound to pay; and therefore it is necessary that he should "have notice. . . ."

In that case it was, of course, plain from the language of the covenant that the burden of it devolved on the executor and the case is therefore no authority on that aspect of my problem; but once I have decided, on other grounds, that the burden of the covenant does devolve on a personal representative, that authority shows plainly, in my judgment, that in such a case notice which the contract or covenant requires to be given to the deceased can and ought to be given to his personal representatives. Accordingly, in my judgment, the plaintiff is entitled to specific performance of the contract and to the costs of the action.

Judgment accordingly.

Solicitors: *Routh, Stacey, Hancock & Willis, for Tallents & Co., Newark; Morrish, Strode & Searle, for Hodgkinson & Beevor, Newark.*

K. R. A. H.

ROMER J.
1949
Mar. 22.

In re CRANSTOUN, DECD.

GIBBS *v.* HOME OF REST FOR HORSES AND OTHERS.

Will—Renunciation of benefits under the will—Position misunderstood by party renouncing—Circumstances in which renunciation capable of being retracted.

Renunciation of a benefit under a will may be retracted at any time provided that no one has altered his position in reliance on the renunciation.

A testatrix bequeathed the residue of her estate to the defendant institution. The latter were under the mistaken impression that acceptance of the gift carried onerous liabilities and that the gift was of little, if any, value. In 1937 they executed a formal renunciation of the gift. The estate remained unadministered for a number of years. When it was finally wound up in 1948, the residue amounted to 4,000*l.* net. The defendants formally withdrew their renunciation and expressed their desire of claiming the benefit of the gift. No one had ever altered his position in reliance on the defendants' renunciation.

Held, that the defendants were in the circumstances entitled to claim the gift of residue. Dictum of Swinfen Eady J. in *In re Young* [1913] 1 Ch. 272 followed.

ADJOURNED SUMMONS.

The testatrix, Pauline Emily Cranstoun, made her will on August 9, 1925. She appointed Charles Edward Shirley Hardman and James Harry Edwards to be the executors and trustees thereof. After bequeathing pecuniary legacies to various named persons and charities, she devised by cl. 5 thereof " my freehold house and premises Hurst Hill House " . . . . unto my trustees in fee simple upon trust at their " discretion to sell the same . . . . and to pay the net proceeds " of such sale unto The Home of Rest for Horses Westcroft " Stables Cricklewood in the County of London and until " the same . . . . shall be sold to permit the said Home of " Rest for Horses to have the use and occupation thereof." By cl. 8 she gave her residuary estate to her trustees upon the usual trusts for sale and conversion and directed them " to " pay my funeral and testamentary expenses and debts " (including mortgage debts) and pecuniary legacies bequeathed " by this my will or any codicil hereto and the estate duty " legacy duty and every other duty payable in respect of my " death in relation to the property passing under this my " will and to pay the residue of the said moneys to the said " Home of Rest for Horses to whom I bequeath the " same . . . ."

The testatrix died on August 13, 1929, and her will was duly proved on January 10, 1930, by Hardman, the second executor Edwards having died in 1929. The premises known as " Hurst Hill House " were subject to a mortgage of 1,700*l.* in favour of the trustees of the will of the father of the testatrix, Lord Cranstoun. The secretary of the Home of Rest for Horses informed Hardman that they could not undertake to run Hurst Hill House as a separate home of rest. In January, 1931, the property was sold for 1,000*l.* and the trustees of Lord Cranstoun's will concurred in the conveyance to release the property from the mortgage. The testatrix was entitled to the mortgage moneys under her father's will, and his trustee directed payment of the purchase money to Hardman. The net proceeds of the sale were applied in the discharge of certain liabilities of the estate. The principal asset of the estate was the sum of 3,400*l.* with interest thereon at $3\frac{3}{4}$ per cent. secured by Scottish bonds and dispositions in security on certain property in Scotland, known as the Benholm estate. This sum was vested in the trustees of Lord Cranstoun's will. The testatrix was, however, the beneficial owner thereof by the joint operation of the will of Lord Cranstoun, an appointment by his widow and a deed poll executed by the testatrix on March 28, 1908.

Correspondence took place between Hardman and the secretary of the Home with regard to the assets and liabilities of the testatrix's estate and as to whether there was likely to be any surplus from the residuary estate. On January 26, 1931, Hardman wrote to the Home saying that it was difficult to estimate the exact benefit which they would receive under the will owing to the difficulty of realizing the Scottish property, but it was expected that there might be a residue of about 2,000*l.* At a meeting of the committee of the Home on January 28, 1931, it was agreed to renounce all claim to the estate. This decision was communicated to Hardman by a letter of January 29, 1931. However, on February 12, 1931, the secretary wrote a further letter to Hardman informing him that he had discussed the matter again with certain members of the committee; that it appeared that they had not fully appreciated the position in regard to the Benholm estate. They thereby asked Hardman to disregard the letter of January 29, 1931. Between 1931 and 1936 there was a gap in the history of the matter. In 1932 the secretary of the Home died and a successor, Captain W. T. C. Joyce, was appointed on June 27, 1932. Hardman died intestate on June 9, 1935, leaving part of the estate of the testatrix unadministered. On July 13, 1936, the solicitors acting for the administrator of Hardman's estate informed Captain Joyce that the administration of the estate had not been completed, and that the position was complicated by the facts that the Benholm estate could not be sold and certain pecuniary legacies had not been paid. They said it was necessary for someone to obtain a grant de bonis non and that the Home were first entitled to the grant, but that if appointed administrators they would be responsible for the winding up of the affairs of the testatrix. On July 21, 1936, Captain Joyce wrote to the solicitors saying that in view of the resolution of January 28, 1931, he had been instructed by the committee not to proceed with the matter. It appeared that Captain Joyce and the Chairman were unaware of the letter of February 12, 1931, and of certain subsequent correspondence and of resolutions passed at committee meetings of the Home later in 1931. The solicitors then wrote to Captain Joyce asking for the names of the trustees of the Home who would renounce the right of the Home to take a grant. They added that the estate was still in a state of confusion, but that if the Scottish property could be realized they considered there would be sufficient funds to pay everyone. At a committee meeting on October 14, 1936, it was unanimously agreed to renounce all claims to the estate. On January 23, 1937, Captain Joyce signed a formal renunciation to that effect. It appeared that no officer of the Home or member of the committee was ever advised that it was competent for the Home to renounce the grant of letters of administration without also renouncing the benefits given to it by the will, or that if the Home were to take a grant they would not be liable for the debts and liabilities of the testatrix beyond the assets of her estate.

On March 11, 1937, letters of administration with the will annexed of the testatrix's unadministered estate were granted to Eileen Russell, a legatee. She died in 1945 leaving part of the testatrix's estate still unadministered. On January 15, 1945, the plaintiff Hugh Edward Gibbs, became secretary of the Home. By an order made by Mr. Registrar Forbes on January 22, 1948, the plaintiff was given liberty to retract the renunciation of January 23, 1937. On April 10, 1948, letters of administration with the will annexed of the unadministered estate of the testatrix were granted out of the Principal Probate Registry to the plaintiff as the secretary and duly appointed nominee of the Home. By reason of his successful administration of the estate and the sale of the Scottish property the residue of the estate became worth 4,000*l.* The questions raised by the summons were whether the Home had renounced their rights to the benefits under the will of the testatrix and, if they had so renounced, whether they were entitled to retract that renunciation.

G. Hewins for the plaintiff.

W. M. Hunt for the first defendant, the Home of Rest for Horses. There was no effective renunciation. The correspondence shows that the Home of Rest for Horses was really willing to accept this gift. Even if there has been a renunciation the Home is entitled to retract. Any such renunciation was purely voluntary, on account of which no one has altered his position. It is open to the Home at any time to retract the renunciation, so long as no one has changed his position in reliance on it : see *In re Young* (1). Accordingly the Home is now entitled to claim the gift of residue.

D. H. McMullen for the second defendant, representing persons entitled on intestacy. The Home has renounced this benefit and cannot now retract. Whatever may have been the position with regard to the renunciation in 1931, the renunciation in 1937 was final. The observations of Swinfen Eady J. in *In re Young* (1) were obiter, and this question was not decided. The real grounds of that decision were different. It is submitted that a final renunciation such as that given in 1937 cannot be retracted so as to allow the Home now to claim the benefits given by the will.

H. O. Danckwerts for the Attorney-General adopted the argument of *Hunt.*

ROMER J. stated the facts and continued : The question which I have to determine is what in the events which have happened is the effect on the rights of the Home to the benefits given them under the will of the testatrix. It is quite clear that the chairman and the secretary of the Home thoroughly misunderstood the position. They were frightened of assuming the responsibilities of meeting the testatrix's liabilities, and they were under a wrong impression as to the mortgages on the two properties. They were in a state of considerable confusion as to what would happen if they accepted the inheritance. Mr. Hunt has argued that there never was an effective renunciation but only informal indications as to their intention. His main argument, however, is that—assuming that there was a renunciation by the Home—inasmuch as it was purely voluntary and one in respect of which they received no consideration, and on account of which nobody had changed his position, then it was open to the Home at any time to retract the renunciation, and to re-assert their position under the will. Inasmuch as in my view of the matter Mr. Hunt is right on that point, I do not find it necessary to come to any concluded view whether or not the correspondence did or did not amount to an effective renunciation.

(1) [1913] 1 Ch. 272, 276.

I am willing to assume that there was a renunciation in 1931 and 1937 by the Home, but nobody suggests that in this particular case anyone has altered his position by reason of the renunciation. What then is the position of a person who renounces a legacy and then thinks better of it, on the hypothesis that no one has taken any steps to alter his position in consequence of that renunciation? In the absence of any authority I should have thought that it was open to anyone at any time to change his mind, when no one has acted to his hurt on the faith of the renunciation. But I have been referred to *In re Young* (1), a decision of Swinfen Eady J., which substantially does cover the point which I have to decide. Mr. McMullen says that the point was not actually decided in that case, and that the matter is still open for decision. It is probably strictly true that the learned judge's observations on this point were obiter, but I have the view of Swinfen Eady J. that if a renunciation is not acted on it may be withdrawn.

From the scanty material available on this principle of renunciation it seems that it was introduced for the benefit of beneficiaries, so that a beneficiary should not be obliged to take what might be an onerous burden; but a natural corollary of the principle is that if anyone acted on the faith of his renunciation and altered his position to his detriment in consequence thereof, the beneficiary would not be allowed to retract his renunciation. Where, as here, no one has altered his position, I cannot see why the claim to retract should not prevail.

Declaration accordingly.

Solicitors: *Jaques & Co., agents for Rowe, Watts and Wood, Ilfracombe; Crawley, Arnold & Co.; The Treasury Solicitor.*

I. G. R. M.

In re STRAKOSCH DECD.

TEMPERLEY *v.* ATTORNEY-GENERAL

C. A.

1949

Feb. 21, 22; *May* 16.

Lord Greene M.R., Somervell and Evershed L.JJ.

Charity—Charitable purposes—Fund created to strengthen bonds of unity between South Africa and the Mother Country—To appease racial feeling between sections of South African community—Trust for benefit of community—Trustees discretion to apply funds towards political or other non-charitable objects—Invalidity.

By his will a testator directed that part of his residuary estate should be held by his trustees upon trust to be applied "to a "fund for any purpose which in their opinion is designed to "strengthen the bonds of unity between the Union of South "Africa and the Mother Country and which incidentally will "conduce to the appeasement of racial feeling between the Dutch "and English speaking sections of the South African community."

Held, that the bequest was not a good charitable gift. The very vague scope of the gift and the unrestricted latitude of application which its language permitted made it impossible for it to fall within the spirit and intendment of the preamble to the statute of Elizabeth.

The suggestion that it was a valid charitable gift as being a gift for the benefit of the common stock of a community could not prevail for the gift must (as laid down in *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A. C. 447) be beneficial for the community in a way which the law regarded as charitable.

The basis on which *In re Smith* [1932] 1 Ch. 153 and the cases there relied on proceeded, explained.

Decision of Roxburgh J. [1948] Ch. 37 affirmed.

APPEAL from Roxburgh J. (1).

By his will dated August 27, 1941, Sir Henry Strakosch, who died on October 30, 1943, directed his trustees to set aside part of his residuary estate upon trust to be applied "to a fund for any purpose which in their opinion is designed "to strengthen the bonds of unity between the Union of "South Africa and the Mother Country, and which incidentally "will conduce to the appeasement of racial feeling between "the Dutch and English speaking sections of the South "Africa community." The value of the testator's estate exceeded 2,400,000*l.* and the fund set aside amounted to about 40,000*l.*

A summons was taken out by an executor of the will asking whether the fund was held on a valid charitable trust, or was void for uncertainty. Roxburgh J. held that the trust failed for uncertainty, as it left the trustees free to apply the fund for political purposes, such as the promotion of changes in the law either of England or South Africa. The Attorney-General appealed. On January 12, 1948, the Court of Appeal gave permission for the Government of the Union of South Africa to be added as a party for the purpose of the appeal. The court also admitted further evidence and in an affidavit dated March 12, 1948, by Field-Marshal Smuts, the Prime Minister of the Union of South Africa, who said that he told the testator who was his personal friend that his object would be best achieved by providing a fund which would bring English and Dutch together in their education, and that he had no doubt that the testators' "object and purpose was to "make provision—by way of students' education, journalistic "training, interchange of young men between Britain and "South Africa and between young South Africans of different "racial origin—to promote this racial harmony and "Commonwealth understanding and solidarity."

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(1) [1948] Ch. 37.

Sir Hartley Shawcross A.-G. and *Danckwerts* for the appellant. The question is whether under the law relating to charities the court is bound to hold that this gift is not charitable because conceivably part of the trust fund might be used for a non-charitable purpose. The attitude of the court to charity has fluctuated from time to time. The early tendency was to restrict such gifts and if the authorities of 100 years ago were applied to-day they would defeat the testator's intention. Twenty years ago the attitude of the court changed and the tendency of the courts was to support charity and enlarge the area and purposes treated as charitable: *In re Wedgwood* (1) per Kennedy L.J. In the past five years there has been a reaction and the tendency is again to restrict charity: *Williams' Trustees* v. *Commissioners of Inland Revenue* (2), *National Anti-Vivisection Society* v. *Commissioners of Inland Revenue* (3). The authorities show that for there to be a valid charity it must benefit the public. This gift fulfils that requirement. By the first limb of this gift its purpose is stated, which is to strengthen the bonds of unity between the Union of South Africa and the Mother Country. By the second limb of the gift it is stated that this is to be done in a way which will allay racial feelings. It is necessary to read

(1) [1915] 1 Ch. 113, 118.
(2) [1947] A. C. 447.
(3) [1948] A. C. 31.

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STRAKOSCH, DECD., *In re.*

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the two limbs conjunctively. If the first is not charitable and the second is, the second may colour the whole. The discretion given to the trustees does not affect the matter. If the purpose of the gift is charitable the trustees could not apply the fund for a non-charitable purpose: *Mitford* v. *Reynolds* (1). The sole question is whether this gift is charitable as being one for the benefit of the community and coming within the fourth class of charities specified by Lord Macnaghten in *Commissioners of Inland Revenue* v. *Pemsel* (2). The fact that the purpose of the gift is beneficial to the community is not enough. In *Attorney-General* v. *National Provincial Bank* (3) the words "patriotic or charitable objects" were read disjunctively. It has been suggested that this is not a charitable gift as the fund might be used to promote legislation intended to further the testator's purpose. The House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (4) did not go so far as to lay it down that if there was merely a power to apply trust moneys in promoting legislation and the power was ancillary to the main purpose which was charitable, this would be fatal to the trust. The main purpose here is plainly charitable and that being so the fact that this purpose might be assisted by applying funds in promoting legislation to modify the law does not prevent the trust from being charitable. He referred to *In re Smith* (5) and *Farley* v. *Westminster Bank* (6). It is submitted that this gift is within the spirit of the Statute of Elizabeth as its object is to promote fraternity and better understanding between two branches of His Majesty's subjects. Further, the most likely method of achieving this purpose is by religious and secular education and not by promoting legislation.

Danckwerts followed. There is a difference between a purpose and a power. The fact that the purpose of the trust may be effected by promoting legislation is not fatal to the validity of the trust. Roxburgh J. went too far in his judgment when he stated that a trust will fail as a charitable trust unless it can be predicated of every mode of application which would fall within the ambit of the trust that it would be not only beneficial to the community but also charitable.

Sir Cyril Radcliffe K.C. and *Winterbotham* for two of the next of kin. The answer to this question depends on determining what on its true construction is the effect of this gift and then seeing what applications of the trust fund are authorized by the gift. The testator here has not made a gift to individuals. The trust fund is vested in trustees who have the widest discretion to decide what is to be done with it. Their only guide is to carry out the purpose indicated. It is a question of a purpose not of a gift. No one can say what "promoting "bonds of unity" means. A gift to promote the bonds of unity between England and South Africa is not a charity. If this gift is not within the first three classes of charity laid down in the Statute of Elizabeth it must accordingly be on the fourth class and be analogous to one of the first three classes. Gifts to a country are construed as being charitable. Gifts, however, for the benefit of a country have been held not to be charitable. The cause which the testator sought to promote is not a charitable cause but a political cause. The respondents base their case on the decision in the House of Lords in *Williams' Trustees* v. *Commissioners of Inland Revenue* (1).

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(1) (1841) 1 Phill. 185.

(2) [1891] A. C. 531.

(3) [1924] A. C. 262.

(4) [1948] A. C. 31.

(5) [1932] 1 Ch. 153.

(6) [1939] A. C. 430.

Cases on the line of *In re Smith* (2) depend on the nature of the gift being such as to benefit a place or a body of persons. There is, however, an inherent uncertainty in the present case as to how the fund is to be disposed of. The object is not to establish Christian principles but to draw together two nations so as to strengthen the tie between them. That is a form of trust that is so vague that the gift is incapable of being called a trust for charitable purposes: see *In re Macduff* (3). Further the gift is of a fund for trustees for them to deal with as they think fit in order to accomplish the object laid down. The whole matter is left in such very wide terms to the trustees. A trust must be sufficiently definite to enable the court to carry it into effect and the only difference in a charitable trust is that the court has to go by the preamble to the Statute of Elizabeth (43 Eliz. c. 4). It is not enough that there should be alternative objects one only of which is charitable as in *Attorney-General* v. *National Provincial Bank Ld.* (4). *Houston* v. *Burns* (5), and *Farley* v. *Westminster Bank Ld.* (6) show how narrow the line is when it has to be decided that a gift is for charitable purposes for the benefit of the inhabitants of a place.

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(1) [1947] A. C. 447.
(2) [1932] 1 Ch. 153.
(3) [1896] 2 Ch. 451, 469.
(4) [1924] A. C. 262, 266.
(5) [1918] A. C. 337.
(6) [1939] A. C. 430.

[LORD GREENE M.R. In the case of charitable objects the courts regard the objects as proper and sufficient beneficiaries.]

That is so, but the objects must very clearly be charitable. *Dunne* v. *Byrne* (1) was a far stronger case than the present one. The gift was to the Roman Catholic Archbishop of Brisbane, "to be used and expended wholly as such Archbishop "may judge most conducive to the good of religion in this "diocese." Even that was held not to be valid. It is impossible to say that the range of application in the present case is within the limit of what is charitable. It was the wide zone of application of a fund even for religious purposes that made the above gift to the Archbishop bad. How much wider is the zone here which might well enable political use to be made of the gift. There are two grounds on which the bequest is invalid: first, that no direct gift was made but merely a vesting of a fund in trustees and secondly, that the objects of the gift are too vague and make the gift void for uncertainty.

Charles Russell K.C. and *Winterbotham* for another of the next of kin. In this case a fund is directed to be set aside and then it is left to the trustees to apply it for a purpose. Such application might for example be to do away with the use of either the English and Dutch languages in South Africa and it would be open to the trustees to pay an organization founded for that purpose. That could not be a charitable purpose. Consequently the gift is void for uncertainty. It is only if the Attorney-General could establish that the objects were necessarily charitable that this gift would be valid. The onus is on him and the language used is not sufficiently clear or limited for him to be able to satisfy that, especially as it is left to the trustees to make use of the fund as they think best to achieve the objects specified; *Dunne* v. *Byrne* (1) is conclusive as to this.

[LORD GREENE M.R. Would you say that the narrower object of appeasement is not charitable?]

Yes, certainly. The appeasement of racial ill-feeling might be attempted in many ways inherently in a political field. It is not as if the testator had directed its accomplishment by education.

(1) [1912] A. C. 407.

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[EVERSHED L.J. The trust is assuming that there are bonds of unity between South Africa and the United Kingdom and the object of the gift is to strengthen them.]

That refers to political bonds under the Crown. The objects of a charitable trust must fall within the preamble to 43 Eliz. c. 4, or be analogous thereto.

W. M. Hunt for the trustees referred to *Bonar Law Memorial Trust* v. *Inland Revenue Commissioners* (1) and *In re Jones* (2).

Sir David Maxwell Fyfe K.C. and *Harcourt Barrington* for the Government of the Union of South Africa. On the point taken that the testator made no gift but merely vested a fund in trustees; it must be remembered that charitable gifts are in a special position in that a gift having charitable objects can still be valid, although not a gift for specific purposes. That is the broad distinction between charitable and other trusts. In regard to the two limbs of the stated purposes, it must be noted that persons of two nationalities are bettered by being reconciled. Here both limbs taken together are clearly beneficial.

[LORD GREENE M.R. Gifts for benevolent objects have been held too vague.]

A further point that has been taken is that the words are dealing with corporations and not people. The answer is that it was obviously the benefit of people that the testator had in mind. *Williams Trustees* v. *Inland Revenue Commissioners* (3) has not, as has been suggested, thrown doubts on *In re Smith* (4) It really harmonizes with the latter case. The fact that the purposes of the trust are public is not enough to exclude them from being charitable. Thus, a gift for the benefit of a village for public purposes is valid. Used in that way the words " public purposes " merely underline the charitable purpose. The foundation of the fourth category stated by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (5), is in 43 Eliz. c. 4, and relates to relief against hardship, but it is greatly modified by the change in condition as shown by *In re Smith* (4) and the line of cases these referred to, consisting of *West* v. *Knight* (6), *Attorney-General* v. *Lord Londsdale* (7), *Attorney-General* v. *Mayor etc. of Carlisle* (8),

(1) (1933) 49 T. L. R. 220.
(2) (1929) 45 T. L. R. 259.
(3) [1947] A. C. 447.
(4) [1932] 1 Ch. 153.
(5) [1891] A. C. 531.
(6) (1669) 1 Ch. Cas. 134.
(7) (1827) 1 Sim. 105.
(8) (1828) 2 Sim. 437.

Mitford v. *Reynolds* (1), *Nightingale* v. *Goulburn* (2), and *Goodman* v. *Mayor of Saltash* (3). It is clear that charitable gifts for the benefit of the inhabitants of a place will benefit such rich inhabitants as there are without losing its charitable purpose. In *Income Tax Commissioners* v. *Pemsel* (4), *Nightingale* v. *Goulburn* (2) was approved. The problem of how to apply the preamble to 43 Eliz. c. 4 to modern conditions is what Lord Macnaghten laid down in *Pemsel's* case (4). He recognized that a gift for a common stock was a good charitable gift, as where a gift was made having as its ultimate object the sober life of the inhabitants of Falkirk: *Inland Revenue Commissioners* v. *Temperance Cafe Trust* (5). The decision in *In re Smith* (6) approves and acts on the line of cases which laid down that a gift for the improvement of a community was a valid charitable trust. The same principle applies here.

[LORD GREENE M.R. referred to *Morice* v. *Bishop of Durham* (7).]

By towards the end of the nineteenth century it became clear that a gift for the moral improvement of any section of humanity was a good charitable gift, although in *In re Grove Grady* (8) an attempt was made to put some limit on this. On that general ground the trust in this case is a valid charitable trust.

[They referred also to *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (9) and *Verge* v. *Somerville* (10).]

Cur. adv. vult.

May 16. LORD GREENE M.R. read the judgment of the court.

The gift which we have to construe is in the following terms: " I direct that the Trust fund and the income thereof " or such part or parts thereof respectively as shall not have " been paid or applied under the trusts affecting the same " shall be held upon trust to be applied by my trustees to a " 'fund' for any purpose which in their opinion is designed " to strengthen the bonds of unity between the Union of

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(1) 1 Phill. 185.
(2) (1847) 5 Hare. 484.
(3) (1882) 17 App. Cas. 633.
(4) [1891] A. C. 531.
(5) 1927 S. C. 261.
(6) [1932] 1 Ch. 153.
(7) (1805) 10 Ves. 522.
(8) [1929] 1 Ch. 537.
(9) [1948] A. C. 31.
(10) [1924] A. C. 496.

"South Africa and the Mother Country and which incidentally "will conduce to the appeasement of racial feeling between "the Dutch and English speaking sections of the South "African community." Roxburgh J. held that it was not a good charitable gift. Before us further evidence was produced consisting of an affidavit by Field Marshal Smuts. We have given this affidavit most careful consideration but we are unable to regard it as affording a reason for coming to a conclusion different from that at which Roxburgh J. arrived. We realize the truth of the contention that the objects to which the gift is to be devoted are matters of great public concern both in the Union of South Africa and in the Mother Country. In particular the appeasement of racial feeling in the Union cannot but benefit all inhabitants of the Union, not merely the members of the two sections of the community expressly referred to. But the very wide and vague scope of the gift and the unrestricted latitude of application which its language permits make it impossible in our opinion to find that it falls within the spirit and intendment of the preamble to the Statute of Elizabeth. We are quite prepared to accept the views expressed by the Field Marshal as to the most effective and satisfactory methods of achieving the objects of the testator. But the question is, not what persons of sound judgment would consider to be the best manner of application, it is how, on the true construction of the gift, it would be permissible to apply the trust funds. In answering this question it is, we think, impossible to limit the permissible methods of application on the lines indicated in the affidavit. The argument of the appellant—and also in particular Sir David Maxwell-Fyfe's contention (which we will deal with more fully hereafter) that anything which contributes to the "common stock" of a community is charitable —in our view amount to no more than a restatement in different language of the oft-rejected argument that what is for the benefit of the public is ipso facto charitable within Lord Macnaghten's fourth class. We may observe that if this gift were to be held to be charitable it would mean that any gift in favour of "charity" generally (i.e., without any specific direction as to its application) could lawfully be applied (e.g., under a scheme) to the objects here stated. This would in our view amount to an extension of the ambit of charity for which the law relating to charities, full as it is of anomalies, affords no warrant either in principle or in authority. With these general observations we will proceed to state more fully the reasons which have led us to our conclusion.

As Roxburgh J. read them the terms of the disposition comprehend any application which in the opinion of the testator's trustees is calculated to promote or subserve what is in truth a political cause or aspiration, viz., that of closer collaboration or relations between two national groups, those of the United Kingdom and the Union of South Africa, and at the same time closer collaboration or relations between those of English and Dutch descent within the confines of one of those national groups, viz., South Africa. We do not think the case is altered if it be assumed in the appellants' favour that the unlimited discretion given to the trustees extends only to the first limb of the objective and not to the second. For in that case the result is that (as Sir Cyril Radcliffe put it) the drawing together of the two divergent races in South Africa (which on this hypothesis is made a condition of any application of the fund) is a part or incident of the broader aim of drawing together two communities which form part of the political organization of the British Commonwealth of Nations: and that which is made the condition is still what we have called a political cause or aspiration. In *Williams' Trustees* v. *Inland Revenue Commissioners* (1), the House of Lords has laid down very clearly that in order to come within Lord Macnaghten's fourth class, the gift must be not only for the benefit of the community but beneficial in a way which the law regards as charitable. In order to satisfy the latter it must be within the "spirit "and intendment" of the preamble of the Statute of Elizabeth. That preamble set out what were then regarded as purposes which should be treated as charitable in law. It is obvious that as time passed and conditions changed common opinion as to what was properly covered by the word charitable also changed. This has been recognized by the courts as the most cursory examination of the cases shows. In order to be within the spirit and intendment of the preamble we take it that one must find something charitable in the same sense as the recited purposes are charitable. Lord Macnaghten's fourth class is represented in the preamble by the repair of bridges, etc., and possibly by the maintenance of Houses of Correction. This negatives any suggestion that charitable must be confined to the poor (*Verge* v. *Somerville* (2)).

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(1) [1947] A. C. 447.

(2) [1924] A. C. 496, 502.

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We have come to the conclusion that though undoubtedly of benefit to the community the purpose under consideration is not "charitable" in the sense in which the benefits to the community instanced in the preamble are charitable. The benefit, as we understand it, does not have to be in any way ejusdem generis with the recited purposes but it has to be charitable in the same sense. In *Attorney-General* v. *National Provincial Bank* (1), Lord Haldane in considering whether patriotic purposes were charitable says this: "In the case "of a gift for charitable purposes there is a desire to profit "people who would not be profited without your gift—that "is the dominant motive. In the case of patriotism there is "a desire to fulfil one dominant purpose, that is to benefit "the cause of the country to which you belong." We think "the appeasement of racial feeling" is within the class of "cause" which Lord Haldane was distinguishing from charity. Field Marshal Smuts (than whom no one can speak with greater authority on this subject) expresses a strong opinion that the proper method for the appeasement of racial feeling is education in its widest sense—"students' education, journalistic training, interchange of young men and women "between Britain and South Africa, and between young "South Africans of different racial origin." It is unfortunate if, as may well be, these methods were in the testator's mind that he did not seek to constitute a trust which might well have been valid as an educational trust notwithstanding that the education had the ultimate aim as set out in the will. We, however, find it impossible to construe this trust as one confined to educational purposes. These may be the best methods but they are certainly not the only methods. The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political. One method conducive to its solution might well be to support a political party or a newspaper which had such appeasement most at heart. This argument gains force in the present case from the other political object, namely, the strengthening of the bonds of unity between the Union and the Mother Country. It would also we think be easy to think of arrangements for mutual hospitality which would be conducive to the purposes set out but would not be charitable. We may mention that the words do not, at any rate to us, suggest the support or promotion of legislation. What we have said in this paragraph we think supports the view which we related to Lord Haldane's observation in the *National Provincial Bank* case (1), and also would make the trust invalid because the words used themselves cover and indeed suggest modes of expenditure which would plainly not be charitable. If the object and the means indicated are clearly charitable then the court is not astute to look for possible but subsidiary non-charitable means which might be within the words used (*In re Hood* (2) and *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (3)). The non-charitable purposes which we have referred to cannot we think be disregarded as merely subsidiary and possible modes of achieving the stated purpose, whatever may have been in the testator's mind.

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(1) [1924] A. C. 262, 267.

That disposes of the case but as the appellant relied very strongly on *In re Smith* (4), we will give our reasons for thinking that that case and the line of cases referred to in it do not lay down the principle which it was sought to extract from them. Sir David Maxwell-Fyfe who developed this part of the argument on behalf of the Union of South Africa submitted that these cases showed that anything which contributed to increase the " common stock "—to use his expression—of a community was charitable. It was held in *In re Smith* (4), that a gift " unto my country England—for " own use and benefit absolutely " was a valid gift. The cases which are reviewed and relied on go back to *West* v. *Knight* (5), in 1669. It was decided in that case that a gift by a testator to the Parish of Great Creaton, where he was born, without saying to what use, was good. There are two possible views of these cases. In Tudor on Charities, 5th edit., p. 45, the view appears to be taken that under such a gift as that to Great Creaton the trustees could expend the money on " public or benevolent " purposes which, if expressly referred to, would have voided the gift. The other view is that where general words are used such as to benefit such and such a parish or " my country " the law will construe these words as restricted to benefits which are charitable in law. We are not suggesting that there may not be cases or statements made in cases which appear to justify the statement in Tudor, but the cases referred to and relied on *In re Smith* (4) seem to us to proceed on the basis of what we have called the second view. In *West* v. *Knight* (5) the Master

(1) [1924] A. C. 262, 267.
(2) [1931] 1 Ch. 240.
(3) [1948] A. C. 31.
(4) [1932] 1 Ch. 153.
(5) 1 Ch. Cas. 134.

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was directed to see that the money was disposed of for the benefit of the poor of the parish. In *Attorney-General* v. *Lord Lonsdale* (1), Leach V.-C. in the passage cited in *In re Smith* (2), construed the words "conducing to the good of "the county of Westmorland" as meaning charitable purposes. The master was directed to settle a scheme under which the money was to be applied for some charitable purpose or purposes. *Attorney-General* v. *Mayor and Corporation of Carlisle* (3), is a complicated case dealing with a special subject matter and we doubt if it assists on the point under consideration. In *Mitford* v. *Reynolds* (4), an objection was based on a provision of the trust that the Governor-General and the inhabitants of Dacca had to agree on the application of the money. It was said, what are you to do if they differ? Lord Lyndhurst in dealing with this objection used these words "I think the answer is obvious. You could not apply "the fund to any charitable object until they agreed, or until "the court, if the court thought itself justified in doing so, "should interfere for that purpose. But the same difficulty "would exist in a great variety of cases. If property is given "for a charitable object to A and B, to be applied to such "charitable institutions in this metropolis as they shall agree "upon, they may differ; but such a bequest was never con-"sidered on that account as not constituting a valid bequest." From these words and a study of the whole judgment it is clear to us that the purposes had to be charitable purposes. In *Nightingale* v. *Goulburn* (5), Wigram V.-C., at the beginning of his judgment states and comments on the argument for the next of kin in these words. "The argument for the "next of kin was, that the words of the bequest are so general "as to admit of the application of the property by the trustee "to purposes not charitable within the construction of that "term adopted in the decided cases. If it can be shown "that the trustee could have such a power as that "which it is suggested on the part of the next of kin that he "would have, the case is at an end." The learned Vice-Chancellor regarded the case as open to doubt, but in holding that the bequest was valid he clearly construed it as covering only charitable purposes according to the decided cases. There are other citations in *In re Smith* (6) which point in the same direction, for example, that from Lord Eldon.

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(1) 1 Sim. 105.
(2) [1932] 1 Ch. 153, 159.
(3) 2 Sim. 437.
(4) 1 Phill. 185.
(5) 5 Hare 484, 487.
(6) [1932] 1 Ch. 153, 169.

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If we are right in holding that the principle laid down is that general words that money is to be applied for the benefit of a district or a country are construed as meaning for such purposes as are recognized by the law as charitable purposes, the principle has no application here where the purpose is expressed. Lord Simonds in his speech in *Williams' Trustees* v. *Inland Revenue Commissioners* (1) referred shortly to this class of case and cited the passage we have referred to from Tudor on Charities. After referring to the difficulty he said, " But I would suggest that it is possible to justify as charitable " a gift ' to my country England ' upon the ground that, " where no purpose is defined, a charitable purpose is implicit " in the context." In the cases to which we have referred this was we think the basis of the decisions and there is therefore no inconsistency between these cases and the law as stated in *Williams' Trustees* v. *Inland Revenue Commissioners* (1). The appeal must be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors : *Treasury Solicitor; Lewin, Gregory, Torr, Durnford & Co. ; Herbert Smith & Co. ; Jaques & Co.*

H. C. G.

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(1) [1947] A. C. 447, 459.

Affirmed. [1950] 1 Ch. 204 *Affirmed.* C.A. [1949] 2 All E.R. 1003.

In re REES' WILL TRUSTS.

WILLIAMS *v.* HOPKINS AND OTHERS

VAISEY J.
1949
Feb. 25.

Will—Construction—Bequest " to my trustees they well knowing my " wishes concerning the same "—Testator's orally expressed intention that trustees should take beneficially.

Evidence is not admissible to show that a gift to a person in a will which is fiduciary on the face of it is intended as a beneficial disposition in favour of that person.

The testator by his will appointed his friend T. H. and his solicitor R. W. (thereinafter called his trustees) to be executors and trustees thereof. He devised and bequeathed the whole of his property "(subject to payment of my funeral and testa- " mentary expenses and debts) unto my trustees absolutely they " well knowing my wishes concerning the same . . . ."

VAISEY J.

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Held, that on the true construction of the will the gift was to the trustees as trustees and evidence was not admissible to show that the testator intended them to take the estate absolutely and beneficially, subject to an obligation to give effect to his wishes communicated to them during his life. Accordingly the estate subject to the purposes indicated by the testator was undisposed of by the will and passed as an intestacy.

Irvine v. *Sullivan* (1869) L. R. 8 Eq. 673; *Croome* v. *Croome* (1888) 59 L. T. 582; and *In re Foord* [1922] 2 Ch. 519, considered.

ADJOURNED SUMMONS.

The testator, the Reverend Thomas Richard Rees made his will on July 29, 1936. He appointed his friend, Thomas Hopkins, and his solicitor, Roger Williams (thereinafter called his trustees) to be executors and trustees thereof. He devised and bequeathed the whole of his property "(subject to payment of my funeral and testamentary expenses and debts) "unto my trustees absolutely they well knowing my wishes "concerning the same and direct them to permit my brother ". . . . to have and receive the rents and profits of my "property Vardre Clydach . . . . during his life-time." The will also included a charging clause authorizing Roger Williams or any professional person who might become an executor or trustee thereof to charge for professional services.

The testator survived his said brother and died on September 9, 1944. Probate of the will was granted to Thomas Hopkins and Roger Williams on March 2, 1945. The testator's residuary estate amounted to some 30,000*l*. Thomas Hopkins died on September 12, 1945. Roger Williams stated in evidence that the testator was a bachelor and that his only near relative was his said brother, whose welfare was the testator's chief concern. The testator had frequently discussed the disposition of his property with the deponent. He said that he wished a certain housekeeper to be rewarded for her services and that he wished to make a number of gifts, including certain charitable gifts. The testator had a number of collateral relations with whom the deponent thought he had little contact, and at some time the testator had informed him that the only relative he wished to benefit was his brother. The testator had, after some discussion, finally decided to leave his estate to the deponent and Thomas Hopkins on their assurance that they would give effect to the wishes which he had previously communicated to them, and on the understanding that any surplus was to be retained by them for their own use. The deponent had felt somewhat uneasy as to the form of the will and had urged the testator to make another will in more explicit terms. But the testator made no other will.

The question asked by the summons was whether the estate of the testator, not required for the payment of his debts and funeral and testamentary expenses, vested on his death in Thomas Hopkins and Roger Williams absolutely and beneficially, subject to an obligation to give effect to his wishes communicated to them in his lifetime, or on a resulting trust for the persons entitled as on intestacy.

Jennings K.C. and *Bowles* for the plaintiff, Roger Williams.

R. H. Walton for the personal representatives of Thomas Williams.

I. Edwards-Jones, *Ungoed-Thomas K.C.* and *Rowe Harding* for various defendants.

The arguments sufficiently appear in the judgment.

VAISEY J. stated the facts and continued. Nobody disputes or doubts that the particular directions which the testator indicated to the legatees, and to which they assented, must be carried out. But the difficulty arises as to what is to be done with what has proved to be a substantial surplus. It is not unreasonable to suppose that, if the testator could be heard to say what he wanted, or what he meant by his will, he would say that he wanted Mr. Williams and Mr. Hopkins to share that surplus between them. But there is a difficulty, and it is a difficulty which is not unfamiliar in these courts, which is that if people wish to make wills they must do so in clear terms, and they must not hide the intentions which they have in mind behind a barrier or curtain of concealment.

There is no doubt that it is a well-settled principle of law that if, upon the true construction of a will, a gift is made to a person as a trustee, evidence is not admissible to show that he was intended to take beneficially. For that proposition, *Irvine* v. *Sullivan* (1) and *Croome* v. *Croome* (2), are authorities. It is a principle which may (and possibly in this case does) operate to defeat pro tanto the wishes of the testator. But the law is that if people want to make wills they must indicate with clarity what they mean, and they cannot pretend to create a trust if they are really attempting to make a beneficial disposition.

(1) (1869) L. R. 8 Eq. 673.

(2) (1888) 59 L. T. 582.

VAISEY J.

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REES' WILL TRUSTS, In re. WILLIAMS v. HOPKINS.

That being the general principle of law, I turn again to the will. These two people were not only appointed executors, but they were also appointed trustees. The trusts which they were intended to carry out are somewhat difficult to define, although undoubtedly they include first the creation of a life estate in the brother in the particular property indicated in the will, and they also include the carrying out of the known wishes of the testator to which I have already alluded.

There is a good deal of authority on this question which is well summarized in Theobald on Wills, 10 ed., p. 339. If I could have construed this will as though it were a gift to these two persons subject to the performance of certain trusts only, and subject to an absolute gift to the legatees, a different position would have arisen. But, in my judgment, this is quite plainly a gift to these two persons as trustees. In a sense these two persons were so connected with the testator that it is not surprising that he chose them to be the objects of his bounty in the circumstances of his lack of near relatives. But it is not quite the same type of case as that developed in some of the authorities where the legatees were persons to whom the testator would naturally be inclined to give a beneficial interest. They were not in a position of a son or a parent or a fiancée (as in *Irvine* v. *Sullivan* (1)) or anything of that kind. They are only named in the will as executors and trustees. In so short a will as this one would have thought that the emphasis in the second clause whereby they were appointed to those offices was something which could hardly have been forgotten in the later parts of the document.

The statement of law in the passage to which I have referred in Theobald continues: " If there is a gift intended to be " beneficial to the legatee, and an obligation is then imposed " on the legatee, which does not exhaust the subject-matter " of the gift, the effect is the same as if it were a gift subject " to the obligation." The law I think is accurately stated in these words: " The case is more difficult if there is a gift to " several persons as joint tenants subject to trusts and those " persons are also executors or trustees of the will. In such " a case the donees prima facie do not take beneficially, " though there may be expressions in the will sufficient to " give them a beneficial interest subject to the performance " of the trusts. If the gift is upon trust, prima facie the donee " can take nothing beneficially, though the trusts declared

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(1) L. R. 8 Eq. 673.

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"may not exhaust the property. But the question is one of "construction upon the whole will, and where the donee in "trust is a wife or relative, whom the testator may be supposed "to have intended to provide for, and there are other circumstances to assist the construction, the proper conclusion "may be that the donee is to take subject only to the partial "trust declared. Words indicating an intention that the "donee is to take beneficially, such as for his own use or benefit, "or absolutely, are of course of great weight in rebutting "a trust . . . ."

I have already referred to *Irvine* v. *Sullivan* (1). There the testator appointed A, B and C as trustees, and gave them his property upon trust for sale although they were also trustees. Then he gave the residue to the lady to whom he was betrothed trusting "she will carry out his wishes with "regard to the same, with which she is fully acquainted." There it was held that the lady in question took the estate beneficially.

At first sight the facts were not unlike the facts here; but they seem to me to differ in several respects, including, in particular, that there were trustees of the will named and appointed to carry out the trusts, and the lady who was engaged to be married to the testator was the sort of person for whom one would assume that it was likely he would wish to provide.

In *Croome* v. *Croome* (2) the opening words of the judgment of Cotton L.J. are a useful guide to the solution of this kind of controversy, but they are of general application and do not really refer to the difficulty which arises in this case which is that the alleged beneficiaries are in fact described as, and undoubtedly are for many purposes, trustees of the will itself.

I was also referred to the case of *In re Foord* (3), where there was a gift to a sister, the will being a very inartistic home-drawn will. The words there were: "All my effects " . . . . I leave absolutely to my sister M. J. on trust to pay "my wife per annum (three hundred pounds)." There it was held that the sister took the property subject to the annuity.

The trouble here is that I construe this will as a gift to the trustees as trustees. I think that they were trustees who had bound themselves in honour to carry out the particular directions the testator had given to them. Even assuming

(1) L. R. 8 Eq. 673.
(2) 59 L. T. 582, 584.
(3) [1922] 2 Ch. 519.

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that the testator had expressed the wish that they should take the surplus, I still think, having regard to the words of this particular will, that is evidence upon which I am unable to act. I do not say that I cannot receive it as part of the story, but it seems to me that if I said these two legatees took the property absolutely, although as a matter of construction they were designated throughout here as trustees, I should be disregarding the principle of equity which I have already mentioned. If I hold, as I do, that, on the true construction of this will, the gift is made to them as trustees, the evidence to show that they were intended to take beneficially is evidence to which I am bound to pay no attention.

I propounded in the course of the argument a number of variations and permutations of this particular problem which, if they arise, may have to be considered at some later date, but so far as this will is concerned I think the effect of it, and the only effect which I can give to it in equity, having regard to the principles to which I have briefly referred, is to say that these two persons became trustees (*a*) for the particular beneficiaries indicated in Mr. Williams' affidavit, and (*b*) for the statutory next of kin of the testator and not for themselves, which is a contradiction in terms, nor do I think that they, having satisfied the primary purposes indicated to them by the testator can turn round and say: "We are no longer trustees; we take beneficially," any more than they can say: "We are trustees for ourselves." Although I have come to the conclusion with some regret, I do not think I can do otherwise than declare that, upon the true construction of the will, and in the events which have happened, the estate of the testator, not required for the payment of his debts and funeral and testamentary expenses, is held subject to the carrying out the wishes of the testator, for the benefit of the persons other than the plaintiffs, Mr. Williams, and his co-executor, and that subject to that the surplus is undisposed of by the will and passes as on an intestacy.

Declaration accordingly.

Solicitors: *Chamberlain & Co., Agents for Beor Wilson & Lloyd, Swansea; Barlow Lyde & Gilbert, Agents for Rutter & Senior, Bromyard, Hereford; J. T. Lewis & Woods, Agents for Alexander & Thomas, Ystalyfera, Glamorgan; Hirst, Miles Griffiths & Co., Agents for John O. Morgan, Pontardawe, Glamorgan.*

I. G. R. M.

In re DOWIE'S WILL TRUSTS.
In re MARRIAGE SETTLEMENT OF SEPTEMBER 24 1936.

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1949
Apr. 6.

BARLAS AND OTHERS *v.* PENNEFATHER AND OTHERS.

Will—Residuary trust fund—Settled shares—Income to daughters for life—Corpus of settled share of named daughter to be held on trust for her children or remoter issue as she should appoint and in default of appointment as directed—Marriage settlement by granddaughter—Assignment by granddaughter in marriage settlement to trustees of " all . . . . the share and interest of " the granddaughter " of and " in the residuary trust fund under the will of " the testator " upon " trust . . . . after the marriage . . . . " to " procure transfer or " payment " to themselves of " those parts of the premises to which " the granddaughter " is entitled in possession immediately " and of " residue . . . . when her expectant interests therein respectively " shall or may fall into possession "—Appointment by daughter of fraction of corpus of her settled share in residuary trust fund on trust after her death for granddaughter absolutely—Death of daughter—Devolution of fraction—" Expectant interests."

A testator by his will and a subsequent codicil gave his residuary trust fund to trustees on trust for his two daughters in equal shares, to hold each share on trust to pay the income of it to the daughter for life and, after the death of either daughter, to hold the corpus of her share on trust for her children or issue as she should appoint and in default of appointment as in the will directed. By a settlement made some years after his death, a granddaughter (being a daughter of the donee of the power of appointment) assigned on her marriage to the trustees thereof " all that the share and " interest of " the granddaughter " of and in the residuary trust " fund under the will of " the testator " upon trust . . . . after " the marriage . . . . that the trustees shall as to those parts " of the premises to which " the granddaughter " is entitled in " possession immediately and as to the residue of the premises " when her expectant interests therein respectively shall or may " fall into possession call in or procure the transfer or payment " thereof to them . . . . " and trusts of the premises were declared. The daughter by deed appointed that the will trustees should stand possessed of her share on trust after her death to hold five twenty-fourth parts of it for the granddaughter absolutely. On a summons issued after the daughter's death to determine whether those five twenty-fourth parts were comprised in the property assigned to the marriage settlement trustees or went to the granddaughter absolutely :—

Held, in deciding that they were payable or transferable to the marriage settlement trustees, (I.) that a settlor under a marriage settlement was not rationally to be expected to wish to settle property coming from a particular source in default of appointment

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but not to wish to settle property coming from the same source by appointment, and that any differentiation in a settlement between those two types of property was to be expected to be found in plain language; (2.) that, in the face of the words "expectant interests," the assignment could not be construed as limited to interests which were present interests at the date of the assignment; (3.) that the word "expectant" was not demonstrably a mistake, but was wholly consistent with what was to be expected to be found in the circumstances and quite appropriate to an interest under an appointment not yet made; and that the court would not therefore read it as though it were "reversionary" just to exclude that construction; (4.) that, accordingly, the interest coming to the daughter under the appointment after the marriage settlement was, at the date of the marriage settlement, an expectant interest in the residuary trust fund under the will.

In re Dickinson's Settlements [1939] Ch. 27 and *In re De La Bere's Marriage Settlement Trusts* [1941] Ch. 443 considered.

Speech of Lord Romer—in which Lord Clauson concurred—in *Muir or Williams* v. *Muir* [1943] A. C. 468, 483, 485, considered and followed.

Lovett v. *Lovett* [1898] 1 Ch. 82 considered and distinguished.

ADJOURNED SUMMONS taken out by the trustees of a will to decide whether an interest appointed by a daughter of the testator in favour of his granddaughter, pursuant to a power of appointment conferred by the will and recited in the granddaughter's marriage settlement, was comprised in the property assigned to the trustees of the marriage settlement or went to the granddaughter absolutely. By the joint effect of his will dated July 1, 1921, and a subsequent codicil the testator's trustees were directed to stand possessed of his residuary trust fund on trust for the testator's two daughters in equal shares but to retain each share and hold it on trust during each daughter's life to pay to her the income thereof and, after the death of either daughter, to hold the corpus of her settled share for her children or remoter issue as she should appoint and in default of appointment as in the will directed. On November 17, 1922, the testator died. By a marriage settlement dated September 24, 1936, and made between a granddaughter of the testator (who was a child of the daughter to whom he had given the power of appointment) and the trustees thereof the granddaughter assigned to the trustees "all that "the share and interest of" the granddaughter "of and in "the residuary trust fund under the will of" the testator "upon trust . . . . after the marriage . . . . that the trustees "shall as to those parts of the premises to which" the grand-

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daughter "is entitled in possession immediately and as to the "residue of the premises when her expectant interests therein "respectively shall or may fall into possession call in or procure "the transfer or payment thereof to them . . . :" and the premises were directed to be held on trusts in such marriage settlement set out. By deed dated June 15, 1940, the daughter irrevocably appointed and declared that the will trustees should stand possessed of her share on trust after her death to hold five equal twenty-fourth parts thereof for the granddaughter absolutely. On July 27, 1947, the daughter died and on February 8, 1949, this summons was taken out.

Stranders for the trustees of the will.

R. S. Lazarus (*T. A. C. Burgess* with him) for the granddaughter. The appointed five twenty-fourths are not comprised in the property assigned by the granddaughter to the trustees of the marriage settlement. True, the words "as to the residue of the premises when her expectant "interests therein respectively shall or may fall into possession" in that assignment must apply to the granddaughter's future property: but they must be read with the preceding expression "all that the share and interest of" the granddaughter "of "and in the residuary trust fund under the will of" the testator: and what the daughter has appointed is not "a share "and interest . . . . of and in the residuary trust fund "under the will of" the testator, but an interest arising on the appointment. When the granddaughter executed the marriage settlement the power of appointment had not been exercised. Therefore she could not, at the time, have any interest in the property subsequently appointed: *Duke of Marlborough* v. *Lord Godolphin* (1). Nor could she have any interest in it until the power had been exercised: *In re Rush* (2). True, the power of appointment was given by the testator, to whose testamentary dispositions the granddaughter owes the fact that she can have anything whatever out of the residuary trust fund: *In re Dickinson's Settlements* (3); *In re De La Bere's Marriage Settlement Trusts* (4); *Muir or Williams* v. *Muir* (5); but the first two of those three cases bear out the contention that the precise interest which the granddaughter would ultimately take depended on whether the daughter

(1) (1750) 2 Ves. Sen. 61.
(2) [1922] 1 Ch. 302.
(3) [1939] Ch. 27.
(4) [1941] Ch. 443.
(5) [1943] A. C. 468.

exercised the power of appointment or died without having done so, in which case the granddaughter's "share or interest" would have derived solely from the limitations under the will which would have thereupon taken effect. The daughter did exercise the power, and the granddaughter's interest is therefore one arising under its exercise, not under the will. If, however, the court does not accept this contention, still the settlement must be construed to refer to those only of the granddaughter's interests which were in being when she executed it: *Lovett* v. *Lovett* (1). At that date it could not possibly have been said what her interests would be, as she could not have known whether the power of appointment would or would not be exercised and so could not have known when she would actually have a "share and interest of and in the residuary trust fund." It was, therefore, certainly not a "present interest" at that time. The expression "is entitled in possession" is in antithesis to the expression "shall or may fall into possession" and what "shall or may fall into possession" are "her "expectant interests therein," according to the assignment as it stands. Clearly, what she intended to do was to assign to the trustees what she had at the time and she must have meant—or, rather, the draftsman of the settlement must have meant—"reversionary," which, accordingly, the court ought to read instead of "expectant." In the circumstances, therefore, the property appointed goes, not to the settlement trustees, but to the granddaughter absolutely.

Tonge for the marriage settlement trustees. The granddaughter is not absolutely entitled. What the daughter appointed is certainly a "share and interest of" the granddaughter "of and in the residuary trust fund" and none of the cases cited on her behalf go to the contrary. The argument for her confuses the instrument "creating" her "share and "interest," namely, the will, with the instrument "appointing" it, namely, the daughter's deed of appointment. Certainly the granddaughter was not entitled to her "share and interest" whatever it might be, until either the daughter appointed it to her or it came to her after the daughter's death without having exercised the power. In whichever of those two ways it came to her, it would—and did—come to her under the will and accordingly now goes to the marriage settlement trustees. On the contention that the settlement must be construed to refer solely to those interests of the granddaughter which were in being when she executed it, *Lovett* v. *Lovett* (1) does not

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(1) [1898] 1 Ch. 82.

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help her. There, an infant settled property which she had at the date of the settlement, not after-acquired property. Here, however, is a marriage settlement reciting the power of appointment and reciting the trusts in default of appointment: and the trustees, after the marriage, are to hold the property assigned "upon trust . . . . that" they shall "as to those "parts of the premises to which" the granddaughter is entitled "in possession immediately and as to the residue of the "premises when her expectant interests therein respectively "shall or may fall into possession call in or procure the transfer "or payment thereof to them . . . ." In that context, the word "expectant" must refer to something in addition to what she had at the date of the settlement, for the whole wording is appropriate to an appointment yet to be made. To ask the court to replace "expectant" by "reversionary" is to ask it to strike out a word which everything indicates to have been used deliberately. The property appointed is accordingly transferable to the trustees of the settlement.

ROXBURGH J. Mr. Lazarus, for the granddaughter, has contended that the appointed fund is not caught by the marriage settlement. He has argued, first, that, even if the assignment in that settlement does include future property, still it does not include the interest created by the appointment, because that interest is not a "share and interest of and in "the residuary trust fund" under the testator's will: and, secondly, that, even if he is wrong in that first submission, the marriage settlement, on its true construction, does not extend beyond present interests, i.e., interests which can properly be described as "present interests" at the date of the settlement.

In support of his first argument he relied on a number of cases, including *In re Dickinson's Settlements* (1) and *In re De La Bere's Marriage Settlement Trusts* (2). In my judgment, however, those cases do not enable him to make good his proposition of law, and in taking this view I found myself on Lord Romer's speech in *Muir or Williams* v. *Muir* (3), wherein Lord Clauson concurred. *Muir or Williams* v. *Muir* (3) was a Scottish case dealing with the application of the Scottish rule against perpetuities, which is quite different from the English rule. In that case, *In re Dickinson's*

(1) [1939] Ch. 27.
(2) [1941] Ch. 443.
(3) [1943] A. C. 468.

Settlements (1), *In re De La Bere's Marriage Settlement Trusts* (2) and *In re Rush* (3) were cited, and Lord Romer dealt with the proposition of law which Mr. Lazarus, for the granddaughter, now seeks to make good. Lord Romer said (4): "If, for example, property be settled on trust for "A for life and after his death on trust for such of A's children "or remoter issue and in such proportions as B shall by deed "appoint, B has no interest in the property whatsoever. "He has merely been given the power of saying on behalf of "the settlor which of the issue of A shall take the property "under the settlement and in what proportions. It is as "though the settlor had left a blank in the settlement which "B fills up for him if and when the power of appointment is "exercised. The appointees' interests come to them under the "settlement alone and by virtue of that document. These "remarks apply equally well to the case where the donee "of the power of appointment has, not only the power of "saying which of the class shall take under the trust, but also "the power of saying what interests they shall take."

Later, Lord Romer said (5): "It would be strange, indeed, "if it were now found that the decision of Lord Hardwicke in "*Duke of Marlborough* v. *Lord Godolphin* (6) had contradicted "or qualified the principle on which the courts of England "have acted for so long. But, in truth, it does nothing of "the sort. With all possible respect to the learned judges "of the Second Division, Lord Hardwicke's decision has no "bearing on the question that is now before the House. The "decision was really no more than the logical application of "the principle to the facts of that case. No statement of the "principle that I have ever seen has suggested that the "appointees under an appointment in their favour take any "interest in the subject-matter of the power until the appoint-"ment takes effect. It is, on the contrary, quite plain that "they do not, and that is all that Lord Hardwicke decided "in the case in question."

Lord Romer then referred to the facts in *Duke of Marlborough* v. *Lord Godolphin* (6) and continued (7): "Lord Hardwicke "pointed out (8) that, although an appointee under a special "power takes under the deed that creates the power, he does

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(1) [1939] Ch. 27.
(2) [1941] Ch. 443.
(3) [1922] 1 Ch. 302.
(4) [1943] A. C. 468, 483.
(5) Ibid. 484.
(6) 2 Ves. Sen. 61.
(7) [1943] A. C. 468, 485.
(8) 2 Ves. Sen. 61, 77.

"not take from the time of the creation of the power. Until "the power is executed he takes nothing. In other words, "the blank in the instrument creating the power has not until "then been filled up. But, where a power is executed by a "will, the interests appointed only vest on the death of the "donee of the power and can only vest in appointees who "are then living, for the donee cannot appoint to persons "who are dead when the appointment takes effect and an "appointment by will does not take effect until the death of "the donee. Had the son and the daughter survived their "mother, their interests would have vested as at her death, "but the interests would, nevertheless, have been created, "not by the will of the wife, but by the will of the husband "and would have come to the son and daughter by virtue of "the latter document. My Lords, that the interests appointed "in pursuance of a special power only arise in point of time "when the appointment takes effect was also one of the "questions decided by Russell J., as he then was, in *In re* "*Rush* (4). The particular question was this. Under the Treaty "of Peace Order, 1919, all property, rights and interests within "His Majesty's dominions belonging to German nationals at the "date when it came into force were subjected to the charge mentioned in the treaty. Now at that date certain German nationals "were entitled to reversionary interests in a settled fund and "these interests were unquestionably subject to the charge. "The interests were, however, liable to be defeated by the "exercise of a special power of appointment of which the "German nationals were among the objects. After the said "date the donee of the power exercised it in favour of the "German nationals in question. It was held that the interests "that had been so appointed to them were not interests to "which they were entitled at the date when the Treaty came "into force. But no one could have successfully contended "that the interests appointed to them were not created by the "instrument from which the power was derived or that they "did not take such interests by virtue of that instrument."

In my judgment, that last sentence in the speech—in which speech Lord Clauson concurred—shows clearly that, although the interest created by the appointment did not arise until the appointment was executed, when it did arise the beneficiary took his interest by virtue of the instrument creating the power, i.e., the will. That, however, is by no means the end of the case, for it is clearly settled—and clear, also, from

(1) [1922] 1 Ch. 302.

Lord Romer's speech—that the interest arising under an appointment is an interest different from that which a beneficiary has in default of appointment. Accordingly it is clear, in the present case, that, at the date of the marriage settlement, the expectancy which the granddaughter had was not a "present interest." I must, therefore, now consider whether the settlement is or is not, on its true construction, an assignment of present interests and of nothing else. In this connexion, I refer to *Lovett* v. *Lovett* (1), where the same question arose. There, Romer J. said: "I bear in mind that the deed was a "settlement by an infant of her then property. Prima facie "it would only pass her then interest under the settlement "referred to in the deed, and not an interest she had not then "and only obtained afterwards, namely, the interest under "the exercise of the power of appointment by the mother. "Ought I in the first place to construe the deed dealing with it "as a question of construction as one intended to pass this "possible future interest—this expectancy?" It is to be noted that Romer J. used that word "expectancy" as the most appropriate description of the possible future interest under the appointment which he was considering. He continued as follows: "In the absence of some overwhelming reason "to the contrary, I think I ought not to do so, bearing in mind, "as I have already said, that the lady was an infant at the "time, and seeing that the deed does not purport to pass any"thing but estates or interests then existing, and does not "purport to settle or deal with after-acquired property. In "the deed of settlement there is no reference whatever to the "power of appointment."

How different is the present case. The document before me is a marriage settlement. The recitals refer, not only to the interests in default of appointment, but also to the possible future interests under an appointment. There is, in my judgment, no rational ground for supposing that anyone making a marriage settlement would wish to settle property coming from a particular source in default of appointment but not to settle property coming from the same source under an appointment. Were it desired, for some special reason, to differentiate between the two, I should expect to find it done in plain language.

True, such considerations would be irrelevant were the language of this marriage settlement itself unambiguous. In my judgment, however, it is not unambiguous. Prima facie, in my view, the assignment of "the share and interest "of" the granddaughter "of and in the residuary trust fund "under the will of" the testator would, as a matter of construction, be limited to shares and interests which were present shares and interests at the date of the deed: but, in the circumstances which I have indicated, no very strong context would be required to exclude that prima facie construction. Here, however, I have what I consider a strong context, for the assignment goes on to direct the trustees to hold the property assigned "upon trust . . . . after the marriage " . . . . that the trustees shall as to those parts of the premises "to which" the granddaughter "is entitled in possession "immediately and as to the residue of the premises when "her expectant interests therein respectively shall or may fall "into possession call in or procure the transfer or payment "thereof to them . . . ." In the face of the words "expectant "interests," this assignment cannot be construed as limited to interests which were present interests at the date of the assignment. Mr. Lazarus, for the granddaughter, has faced that difficulty and has asked me to read the word "expectant" as though it were "reversionary." Could I do so, it would fit in with his argument, for a reversionary interest is undoubtedly a present interest. In my judgment, however, there is nothing here to suggest that the word "expectant" is a mistake. It is entirely consistent with what I should expect to find in the circumstances. I should, therefore, not be justified in striking out a word which is quite appropriate to an interest under an appointment not yet made and substituting for it a word suggested in argument solely in order to exclude that construction.

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(1) [1898] 1 Ch. 82, 86.

In my judgment, I am bound to construe the marriage settlement as including the granddaughter's expectant interests in the residuary trust fund under the testator's will: and the interest which the granddaughter obtained under the appointment subsequently to the marriage settlement was, in my judgment, an expectant interest in the residuary trust fund under that will at the date of the marriage settlement. Accordingly, the five twenty-fourth shares are payable or transferable to the trustees of the marriage settlement.

Declaration accordingly.

Solicitors: *Simon, Haynes, Barlas & Cassels; Monro, Saw & Co.*

K. R. A. H.

ROXBURGH J.

1948

Nov. 29, 30; Dec. 1, 2, 3, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20 21.

BRITISH MOTOR TRADE ASSOCIATION *v.* SALVADORI AND OTHERS.

Contract—Conspiracy—Trade Association—Covenant by purchasers of new cars not to re-sell within twelve months—Breaches—Procurement of breaches.

A person who, knowingly and without justification, actively facilitates a breach of contract and thereby causes damage, is guilty of the tort of procurement of breach of contract.

The plaintiff Association were a trade union of which all British motor-car manufacturers and authorized dealers were members. It was the policy of the Association to prevent the immediate resale of new cars, an operation which, owing to the short supply of new cars available to the home market, would have led to price inflation. Accordingly, every member of the public who purchased a new car was required to execute a deed of covenant with the plaintiffs and with the dealer from whom he purchased it that he would not re-sell it within a period of twelve months. The defendants were either not members of the plaintiff Association or were on their stop list, and accordingly were unable to acquire new cars through authorized channels. But by devious means they obtained new cars which they shortly afterwards re-sold far above the original prices. Their usual plan of operation was to buy the cars from persons, usually their agents, who had themselves signed the covenant and bought the car only a very short time previously. It was not suggested that the defendants were unaware of the covenant system. The plaintiffs alleged: (1.) Conspiracy to procure breaches of contract; (2.) Procuring breaches of contract; and (3.) Breach of contract.

Held, (i) that the plaintiffs had proved seven cases of procurement of breach of contract and also two cases of breach of contract. (ii) That the defendants' acts constituted an interference with the plaintiffs' contractual rights in respect of which the plaintiffs were entitled to relief. (iii) That the policy of maintaining fixed prices was a trade interest which the plaintiffs were entitled to protect. (iv) That the plaintiffs had established by their evidence that a failure of the covenant system would cause them to cease functioning; that to counteract the defendants' attack on the system the plaintiffs had had to maintain an expensive inquiry service; and that accordingly, they had proved damage, growing from the defendants' wrongful acts and were entitled to an inquiry as to damages as well as to an injunction in appropriately limited form.

Quinn v. *Leathem* [1901] A. C. 495; *Exchange Telegraph Co. Ld.* v. *Gregory & Co.* [1896] 1 Q. B. 142; and *Thorne* v. *Motor Trade Association* [1937] A. C. 797, applied.

ACTION.

The plaintiff Association was a trade union of which all

British motor-car manufacturers and all their authorized distributors and dealers were members. No imported cars being available at present, no dealer who was not a member of the Association could obtain a new car for sale to the public from any manufacturer in the ordinary course of trade. Every authorized distributor or dealer who obtained such a car was bound to sell at the list price. If he broke this rule he was liable to be fined, and in the end he might be put on a stop list. The effect of this was that no member of the Association was permitted to trade with him. The defendants were all either not members or on the stop list, and accordingly they could not obtain a new car through an authorized dealer except by a device such as corruption or impersonation. But the reward for a successful adventure might be more than twice the list price.

The main function of the Association was to protect the interests of the motor trade and the purchasing public, and its policy in that regard was to ensure that list prices were neither inflated nor cut. It controlled its members by rules, fines and by the stop list. To extend this system to the purchasing public every purchaser of a new car was required to execute a deed of covenant on or before delivery of the car with the Association and the dealer who supplied the car, not to resell for a period of a year. The period was formerly six months. The form of covenant was as follows: "This "deed made the . . . . day of . . . . between . . . . "of . . . . in the County of . . . . hereinafter called the "owner of the first part and the British Motor Trade "Association, hereinafter called the Association of the second "part and . . . . of . . . . hereinafter called the dealer "of the third part whereas (*a*) the dealer has sold and delivered "to the owner the motor vehicle hereinafter called the said "vehicle whereof particulars enabling the same to be identified "are set out in the schedule hereto. (*b*) The Association "is an association of manufacturers and dealers engaged in "the motor industry of Great Britain whose objects are to "protect the interests of the motor trade and to safeguard "the purchasing public, and for this purpose, inter alia, "to prevent price inflation of motor vehicles and of which "association the dealer is a member. (*c*) As part of the "consideration for the said sale the owner agrees with the "dealer that he will upon the said vehicle being delivered "to him by the dealer enter into such covenants with the

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" Association and the dealer as are hereinafter contained. " Now this deed witnesseth and it is hereby agreed as follows : " (1.) The owner hereby covenants with the Association, and " as a separate covenant with the dealer that he will not " during the period of twelve months from the date hereof " without the consent in writing of the Association, which " consent shall not be unreasonably withheld, use the said " vehicle or permit the same to be used for any purpose what-" ever other than the private, professional or trade purposes " of the owner so that without prejudice to the generality " of the foregoing the owner shall not during the said period " without the consent in writing of the Association sell, " give, pledge, hire, whether by way of hire-purchase or " otherwise, or otherwise deal with the said vehicle in any " manner whereby the property therein is or may be transferred " to any other person. (2.) The owner hereby covenants with " the dealer that he will for every breach of covenant on " the part of the owner hereinbefore contained pay to the " dealer as and by way of liquidated damages and not as a " penalty without prejudice to the existing rights or remedies " of the dealer hereunder the sum of . . . . pounds. In " witness whereof the owner has hereunto set his hand and " seal the day and year first above written." A space was left for the signature and the covenant continued : " Signed, " sealed and delivered by the above-named owner in the " presence of." There was a place for the witness to sign, and to write his address and occupation. Then there was a schedule which referred to the make of car, model of car, chassis number and registration number.

The secretary of the Association said in evidence : " The " Association introduced what is now known as the covenant " scheme . . . . to ensure that those who were genuinely " in need of a motor-car or motor vehicle obtained it at the " manufacturers' list price, and that the retail prices of " motor-cars were not inflated, which would have resulted in " cars going only to those persons with the greatest amount " of cash in their pockets. . . . . It would be beyond human " endurance to expect dealers to sell at a narrow margin " when they saw their customers immediately obtain the " price of three times that amount within a few minutes " of sale."

He stated that the covenant system was on the whole operating successfully, and suggested that the proportion of breaches might be about 2½ per cent. He said in conclusion that if the proportion of breaches became large the effect would be to deprive the Association of its fundamental function, and that it could not continue to exist. With the present state of the market, and with the state of the market as far as one could foresee it, until the Government chose to supply enough cars to meet the demand of the home market practically all the functions of the Association turned on the covenant system. Although there were rules which would continue if the covenant scheme were abandoned, in the present state of the market he could see no useful purpose that the Association could perform if the covenant system were removed.

A dealer outside the Association might have at his disposal a practically new car at double the list price. This might happen in at least three ways: (1.) he might himself make and break a covenant; (2.) he might find the purchaser anxious to break his covenant, and this would be so if the purchaser were only an ostensible purchaser or was another outside dealer; or (3.) he might induce a breach of covenant. The defendants were all members of the so-called "Warren "Street kerb market." This market was frequented by dealers in cars, old and new, but its characteristic feature was that no new car interested it unless it was changing hands above the list price. The market was operated on the kerb side, in basements and tiny offices and in cafés.

The usual plan of operation was for one of the members or associates in this market to put up an ostensible purchaser to sign the covenant, providing him with enough notes to pay the list price for the car, reward himself handsomely and bestow any bribes which might be necessary. Many of the transactions before the court conformed to this pattern. While the ostensible purchaser was really an agent of the operator who supplied the money, he executed the deed in his own name and without power of attorney. Accordingly, he was alone liable on the covenant, and when his principal in accordance with the bargain called upon him to hand over the car, he procured a breach of covenant. This operator, however, did not in the normal case himself sell the car to the public. He sold it to another trader. If that other trader were an independent operator he could not be sued for procuring a breach of covenant because the covenant did not run with the car and, accordingly, the second operator was dealing not with the covenantor but with another operator who was not bound by the covenant. It would have been otherwise if the first operator had been the agent of the second operator. Sometimes, however, there was only one operator who found an independent covenantor anxious and willing to sell.

The plaintiffs relied on three separate causes of action: (1.) Conspiracy to procure breaches of contract; (2.) Procuring breaches of contract; and (3.) Breach of contract.

Pritt K.C., *Aldous* and *J. Brewis* for the plaintiffs. If the covenant system were to break down, the plaintiffs would be immeasurably injured, and in fact their organization would be destroyed. The plaintiffs are a trade union, as such they are an entity entitled to protect themselves and to recover damages in respect of torts committed against them: see *National Union of General and Municipal Workers* v. *Gillian* (1). Sales of cars at inflated prices would injure the plaintiffs' trade interest. Money compensation may lawfully be asked in respect of such damage to the plaintiffs' trade interest done by the defendants: *Thorne* v. *Motor Trade Association* (2); *Ware and De Freville* v. *Motor Trade Association* (3). The plaintiffs have a trade interest, because a trade interest is not merely buying and selling. It means an interest in a trade: see *Sorrell* v. *Smith* (4). This organization was formed for the purpose of protecting the motor trade. The plaintiffs are entitled to protect these interests, thus they are entitled to put a person on the stop list or demand money compensation in lieu thereof. In cases where it is impossible to forecast accurately the damage from one wrongful act, yet the damage would be substantial from very many such acts, then the damage from each act is not nominal but substantial: *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.* (5).

Shelley K.C. and *Hunter-Brown* for the defendants. The plaintiffs in order to succeed must establish in each case: (*a*) that there was a valid covenant enforceable by the plaintiffs; (*b*) that there was direct or indirect contact between the defendants and the person breaking the covenant; and (*c*) that persuasion was exerted to break the covenant. The

(1) [1946] K. B. 81.
(2) [1937] A. C. 797.
(3) [1921] 3 K. B. 40.
(4) [1925] A. C. 700.
(5) [1915] A. C. 79.

plaintiffs have produced no real evidence of procuring or persuasion. They have shown that witnesses could have been persuaded, then discredited the witnesses, and asked that certain inferences be drawn. That is a fallacious approach: *Non-Drip Measure Co. Ld.* v. *Strangers Ld.* (1). It is not sufficient on a question of procuring a breach of contract merely to show that the evidence is consistent with procuring. The evidence must actually establish procuring, for a plaintiff is not entitled to show that it does not negative procuring and then attempt to put the onus on the defendant. The onus is entirely on the plaintiff. *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (2) is of some assistance to show what the evidence should establish in procurement of a breach of contract. If there is procurement, other conditions being fulfilled, it is actionable. The cases do not define procurement. In the cases where there has been procurement, it has not been in issue: *Quinn* v. *Leathem* (3); *De Francesco* v. *Barnum* (4).

Each transaction must be looked at independently, "in "blinkers." It is suggested that the various transactions were not separate, but part of a system. There must be evidence to support that submission, it is not permissible to read the circumstances of one case into another. What happens in one transaction cannot be evidence of what happens in any other: *Viney* v. *Barss* (5); *Kennedy* v. *Dodson* (6). Conspiracy to break a contract is not actionable unless the contract is broken and damage has enured. Only one case of procuring a breach of contract has been proved, and the existence of one case is not sufficient to establish a conspiracy. The existence of a market in and around Warren Street is equally insufficient on which to found conspiracy: *South Wales Mines Federation* v. *Glamorgan Coal Co.* (7). Short of conspiracy there is no ground for an injunction. Cases cited by the plaintiffs on the question of damages are of no assistance in deciding how much damage the plaintiffs should be awarded, and are of limited application: see *Brimelow* v. *Casson* (8). Therefore the plaintiffs are thrown back on the ordinary rule, that they are entitled to such damages

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(1) (1942) 59 R. P. C. 1, 25, 26.

(2) [1908] 1 Ch. 335, 342, 345, 357.

(3) [1901] A. C. 495.

(4) (1890) 45 Ch. D. 430, 443.

(5) (1795) 1 Esp. 293.

(6) [1895] 1 Ch. 334, 337, 338.

(7) [1905] A. C. 239, 249.

(8) [1924] 1 Ch. 302.

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for breach of contract as they can prove. They are not entitled to damages if no pecuniary loss is shown, although the exact amount need not be quantified: *Exchange Telegraph Co. Ld.* v. *Gregory & Co.* (1). If it were held that the existence of the market constituted conspiracy the plaintiffs would be entitled to an inquiry as to damages, otherwise damages would be confined to the particular breaches, and an inquiry would not be ordered. The plaintiffs cannot have suffered any damage unless one or other of their individual members have suffered damage. But the mere transfer of a motor-car cannot involve any damage. The court is not entitled to look at anything else and is not entitled to consider the surrounding circumstances. If no damage arises from one breach, a number of breaches cannot cause any damage. The expenditure incurred in investigating a breach of covenant is not incurred on account of any alleged breach but on account of the plaintiff's policy. Any damages awarded must be the actual result of the breach: see *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (2). Whether an injunction is justified depends on the facts of the particular case. In this case it is plainly not justified. The evidence shows that no damage at all has been proved, the failure to keep a covenant does not hurt the plaintiffs in the sense the law requires for an injunction.

Pritt K.C. in reply. Where a number of people "federate" together to obtain goods which can only be got by somebody being led into breaking a contract, it is a conspiracy to procure that purchase. In order to be entitled to damages it is only necessary to prove conspiracy and that damage is caused to you. The law of conspiracy is defined in Salmond on Torts, 10th ed., pp. 362, 604, 612. [Counsel also referred to: Lauterpacht in 52 Law Quarterly Review, pp. 494, 495, 500; *Lumley* v. *Gye* (3); *De Francesco* v. *Barnum* (4); *Wilkins Ld.* v. *Weaver* (5).] If the defendants interfere with the covenant by buying a car with knowledge of the covenant, that is enough, any other activity leading to a breach of covenant with knowledge is also enough. The mere existence of a person who is an insulator, i.e., not an agent or confederate, will not destroy the link between the defendants and the person who breaks the covenant, although there must be some sort

(1) [1896] 1 Q. B. 147.
(2) [1908] 1 Ch. 355, 370.
(3) (1853) 2 Ell. & Bl. 216.
(4) (1890) 63 L. T. 514.
(5) (1915) 84 L. J. (Ch.) 929.

of contract, direct or indirect. Damages for conspiracy are at large: see Mayne on Damages, 11th ed., pp. 518–519; *Pratt* v. *British Medical Association* (1). Although each individual breach of covenant may cause little damage, a great number of breaches would break the plaintiff association. Therefore each breach should not be treated in isolation, but as part of a series of transactions which, if aggregated, cause the plaintiffs serious harm. The plaintiffs have had to maintain an expensive investigation department, the costs of which should be included in the damages: see *Exchange Telegraph Co. Ld.* v. *Gregory & Co.* (2); *Goldsoll* v. *Goldman* (3). The conspiracy may be said to be a counter-attack on the plaintiffs' trade policy. In price maintenance cases selling at an "over price" may cause just as much harm as selling at under prices.

[*Thorne* v. *Motor Trade Association* (4); *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.* (5) were referred to.]

ROXBURGH J. stated the facts and proceeded: This case necessitates a close investigation of the law relating to procurement of breaches of contract. I can start from a classic citation extracted from Lord Macnaghten's speech in *Quinn* v. *Leathem* (6): "Speaking for myself, I have no hesitation "in saying that I think the decision"—that is the decision in *Lumley* v. *Gye* (7)—"was right, not on the ground of "malicious intention—that was not, I think, the gist of the "action—but on the ground that a violation of legal right "committed knowingly is a cause of action, and that it is a "violation of legal right to interfere with contractual relations "recognized by law if there be no sufficient justification "for the interference."

I have already said enough about the defendants and their activities to show that if they interfere knowingly with contractual relations they have no justification for doing so, but Mr. Shelley contends that it is no tort merely to make a price with a man who is offering a car for sale in breach of covenant because a willing seller needs no inducement. The

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(1) [1919] 1 K. B. 244.

(2) [1896] 1 Q. B. 147, 153, 155, 158.

(3) [1914] 2 Ch. 603.

(4) [1937] A. C. 797, 824.

(5) [1915] A. C. 79, 88, 89, 91, 93.

(6) [1901] A. C. 495, 510.

(7) 2 Ell. & Bl. 216.

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importance of the point is obvious, because if it is well founded the question whether a tort has been committed will depend on whether the buyer or the seller speaks the first word, and as the buyer and the seller may both be hostile to the plaintiffs for obvious reasons, the plaintiffs are likely to be met with unchallengeable evidence that the seller took the initiative.

It is true that the tort is often spoken of as inducing or procuring breach of contract, but I shall adhere to Lord Macnaghten's word "interfere," and I shall endeavour to interpret that word in the knowledge that Lord Macnaghten in using it had *Lumley* v. *Gye* (1) in his mind. Now, *Lumley* v. *Gye* is undoubtedly a case in the direct line of descent of this principle of the common law, but *Lumley* v. *Gye* had an earlier ancestry, and I feel that I shall not err if I interpret Lord Macnaghten's phrase in the light of those earlier cases. The first is *Blake* v. *Lanyon* (2). That decision was: "An "action will lie for continuing to employ the servant of another "after notice, without enticing him away. Here no fault "could be imputed to the defendant for taking Hobbs into "his service in the first instance, because then he had no "notice of Hobbs's prior engagement with the plaintiff: "but as soon as he had notice of that fact, he ought to have "discharged him." This case was followed in 1890 in *De Francesco* v. *Barnum* (3) (there are two such cases), where the head-note is: "The plaintiff in May, 1889, entered into "agreements with five girls whereby they agreed to perform "in the ballet for the plaintiff during the following pantomime "season at certain salaries. In October, 1889, B., "who had at that time no notice of these agreements, engaged "the same girls to perform under his direction. The plaintiff, "on discovering this engagement, gave notice to B. of the "agreements of May, 1889, but notwithstanding this the "girls continued to be employed by B. The plaintiff sued "B. for damages for continuing to employ the girls after notice "of the agreements of May, 1889, and the girls for breach "of these agreements. Held, following *Blake* v. *Lanyon* (2) "that an action will lie against one who continues to employ "the servant of another after notice of the prior contract of "service, and that in order to maintain such an action it is "not necessary that the employer and employed should stand "in the strict relation of master and servant." In giving judgment Fry L.J. sitting as an additional judge of the Chancery Division, said: "Then this further point arises: in *Blake* v. "*Lanyon* (1) the case was one of master and servant, and not "merely of employer and employed. It is suggested that the "doctrine cannot be applied except in the strict case of master "and servant. But it is to be observed in the case of *Lumley* "v. *Gye* (2) the strict relation of master and servant did not "exist, and the court nevertheless held that the doctrine "of enticement did apply and was actionable, although the "relation of master and servant might not have existed. "It appears to me plainly to follow that, inasmuch as it has "been now held that in the cases where it is not master and "servant the doctrine of enticing will apply, the law is the same "in the case of continuing in employment after notice, and "has been settled to be this, that you can maintain an action "either for enticing away a servant or person employed, or "for continuing to employ a person, a servant, or employé "after notice. I think therefore that the action lies."

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(1) 2 Ell. & Bl. 216.

(2) (1795) 6 T. R. 221, 222.

(3) 63 L. T. 514, 515.

I cannot doubt that Lord Macnaghten, in using the word "interference" had such cases in mind. Indeed, it is possible that in choosing that word for his statement of general principle he intended to make some reduction in their ambit, for those cases seem to treat something akin to mere passivity as a tort and to require active dissociation from the breach of contract, and they are still of unimpaired authority in the circumstances to which they apply and have since been followed by Joyce J. in *Wilkins Ld.* v. *Weaver* (3). But, Lord Macnaghten preferred the word "interference" for his statement of the doctrine, and this seems to me to predicate active association of some kind with the breach. But, in my judgment, any active step taken by a defendant having knowledge of the covenant by which he facilitates a breach of that covenant is enough. If this be so, a defendant by agreeing to buy, paying for and taking delivery of a motor-car known by him to be on offer in breach of covenant, takes active steps by which he facilitates a breach of covenant and it is not seriously contended that in any of the cases with which I am concerned the defendant did not know of the existence of the covenant or thought that the covenantor had obtained a release. The plaintiffs will succeed even if I have construed the word "interference" too broadly,

(1) (1795) 6 T. R. 221, 222.

(2) 2 Ell. & Bl. 216.

(3) 84 L. J. (Ch.) 929.

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because even if a further element of inducement must be present, that further element can be found. The covenantor who offers a car for sale is not unconditionally ready to break his covenant but only if the price offered is high enough and, accordingly, a defendant who offers such a price induces the seller to take the final step towards breaking his covenant by making his willingness to sell unconditional. It is, of course, necessary for the tort of procurement of breach of contract to establish damage. I will postpone the consideration of that particular question until a later stage in my judgment.

There is, in my judgment, no doubt that all the personal defendants, even though not general partners, are and have at all material times been intimately associated in business. I reject their description of themselves as competitors. They formed a ring in the market and they traded together. Moreover, such operations as the defendants were engaged in could not succeed without concerted action, because various subterfuges were necessary to avoid detection and the car had to pass rapidly from one name to another.

His Lordship dealt at length with each individual breach of covenant. He found seven cases of procurement of breach of contract and four cases of breach of contract, and he held that the defendants had conspired to procure breaches of contract.

His Lordship continued: I now come to the question of damages, and I have to deal with it both in connexion with the conspiracy and also in relation to the breaches of covenant. I can begin with the case of the *Exchange Telegraph Co. Ld.* v. *Gregory & Co.*, a decision of the Court of Appeal (1). The headnote is as follows: "In order to support an action for "maliciously inducing persons to break their business contracts "with the plaintiff proof of specific damage need not be given; "it is sufficient to prove facts from which it may properly "be inferred that some damage must result to the plaintiff "from the defendant's wrongful acts." Kay L.J. said: "As to the third head, it was argued that the defendant "was not bound by any contract with the plaintiffs, and that, "in order to maintain an action against him for inducing "subscribers to break their contracts with the plaintiffs, "damage to the plaintiffs must be shown. I agree that the "gist of the action would be damage; but if a judge or jury "could properly infer from the acts complained of that those

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(1) [1896] 1 Q. B. 147, 155.

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" acts must result in damage to the plaintiffs, that is enough. " As I have already pointed out, if the defendant had not " obtained the information fraudulently "—this is a reference to the facts of that case—" the only other way would have " been to get it from the newspaper, which he must have " bought. But further, what the defendant did was a direct " interference with the plaintiffs' business. It was an obtaining " of very valuable information, in respect of which the plaintiffs " made profits by communicating to a limited number of " persons. It is obvious that what the defendant did could " be done by others, and very few persons would become " subscribers if the information could be got by inducing " some person who had it as a subscriber to communicate " to others in this way. The inference is irresistible that " damage must accrue to the plaintiffs from such an act as the " defendant has committed."

The Exchange Telegraph Co. Ld. was, however, a trading corporation and the plaintiff association is a certified trade union. I do not think that that distinction stands in the way of the plaintiffs. The head-note in *National Union of General and Municipal Workers* v. *Gillian*, a decision of the Court of Appeal (1), begins as follows : " A trade union can, in general, " maintain an action in tort and an action for libel is no " exception to that rule." Dealing with this important matter, Scott L.J. said : " In my view, the true interpretation " of the Acts "—that is the Acts relating specifically to trade unions—" is that a trade union is given all powers of a persona " juridica except (*a*) those solely characteristic of a natural " person, and (*b*) those which are expressly excepted by the " creating or enabling statute. This conclusion is strongly " supported by a consideration of what must have been in " the mind of Parliament. The policy of the Act was to " encourage collective bargaining by legalizing the position " of trade associations formed for purposes which, taken alone, " were obnoxious to the common law as being in restraint " of trade. The main feature of collective bargaining is to " collect the members on each bargaining side into coherent " units which can speak or make agreements for the side." " Therefore, the more each side in an industry can be collected " together so as to act with one mind, the better for the policy. It is noticeable that Scott L.J. does say " either side." " Enthusiasm for joint action is the driving force, and

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(1) [1946] K. B. 81, 86, 88.

"disintegration of the union is the supreme danger. The "men's union, more especially, must be able to protect itself "against any form of attack calculated to arouse doubts and "suspicions in the minds of members, and so to destroy the "cohesion and will to act of the union. Against endeavours "of this sort the union must have powers of defence; and "the most effective power of all is the right of action in the "King's courts. Indeed, that right seems to me vital, and "I cannot think that Parliament could possibly have intended "not to confer it." It is strange how appropriately those words apply to the present case, once the transference which Scott L.J. himself contemplates from a union of men to a union of masters is made. Uthwatt J., as he then was, says (1): "It is well established that in certain "cases"—it must be remembered that this particular case was a case of libel—"a trading corporation may bring a suit "in respect of an imputation on its trading reputation, and "I see no reason why a non-trading corporation should not "have the same rights as respects imputations on the conduct "by it of its activities. A trade union to my mind stands "in the same position. It, too, has its reputation. Why "should it not be protected? The social duty so to conduct "the affairs of the union as not to invite well-founded "criticism is hardly forwarded by a denial of the right to seek "redress for an unjustified disparagement of its activities."

The plaintiff Association is a trade union having its trade interests which it is entitled to protect. Lord Roche, in his speech in *Thorne* v. *Motor Trade Association* (2) referred to *Ware and De Freville* v. *Motor Trade Association* (3) (and the Motor Trade Association in those two cases is the same body as the present plaintiffs) and said: "The reason why procedure "by way of stop list was there held not to be unlawful was "that though it was taken by persons acting in combination "the intent of the procedure was the protection of the "defendants' trade interests." I must hold, therefore, that the maintenance of fixed prices and the covenant system as an integral feature of that policy is a trade interest which the plaintiffs are entitled to protect against unlawful interference.

The Warren Street kerb market is the forum of an organized counter-attack on the covenant system. The defendants are a ring within that market which is counter-attacking by means of a conspiracy to procure breaches of contract and many overt acts have been proved. These counter-attackers adopt every available means of covering up their tracks and as occasion requires resort to false names, false addresses and false documents. The plaintiffs are bound to react strongly against such counter-attack which imperils their very existence. I must recall what Mr. Johnson-Davies, the secretary, said: "There would be no manufacturers' "prices if they were not maintained. It would be beyond "human endurance to expect dealers to sell at a narrow "margin when they saw their customers immediately obtain "the price of three times that amount within a few minutes "of sale." Of course it would. Again he says: "At the "moment, my Lord, with the present state of the market, "and with the state of the market as far as one can foresee "it, until the Government choose to supply enough cars "for the home market to meet the home demand"—and Mr. Johnson-Davies gave me some very gloomy prognostications on that head—"practically all the functions of the "Association turn on the covenant system. It is true that "there are rules and there would still continue to be rules "if the covenant scheme were abandoned, but with the "covenant scheme removed, in the present state of the market "I can see no useful purpose that the Association can perform." I accept that evidence, and if of course the Association could perform no useful purpose, I am prepared to infer that its membership would decline almost, if not quite, to the point of extinction. To resist such a counter-attack and also counter-attacks from various other directions, the plaintiffs maintain, and must maintain, a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. Accordingly, the plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry accordingly.

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(1) [1946] K. B. 81, 88.

(2) [1937] A. C. 797, 824.

(3) [1921] 3 K. B. 40.

As I had already indicated, not all the overt acts are exclusively referable to the conspiracy. Two of them are referable, yet at the same time they involve breach of covenant. Two transactions, though forming no part of the conspiracy, represent breaches of covenant. As no conspiracy to make and break contracts by impersonation or otherwise is alleged, damages for each breach of covenant must be assessed separately, and great care must be taken to ensure that in no case are damages awarded twice over in respect of the same transaction. Mr. Shelley, however, contended that this is not enough. He submits that there should be no inquiry at all as regards damages for breach of covenant, because, as he contends, only nominal damages are recoverable. I do not think so. I think that as regards each separate breach the master must estimate as best he can the pecuniary loss which the plaintiffs have suffered having regard to the circumstances in which it occurred and the difficulties which have confronted the plaintiffs in detecting and unravelling it before they were in a position to take proceedings, and I shall direct an inquiry accordingly.

For these propositions I feel that I may legitimately derive some support from the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.* (1). The second part of the head-note, which I must read in order to explain the point of the case, is as follows: " The appellants, " who were manufacturers of motor tyres, covers, and tubes, " supplied these goods to the respondents, who were dealers, " under an agreement whereby the respondents, in consideration " of certain trade discounts, bound themselves not to tamper " with the marks on the goods, not to sell or offer the goods " to any private customers or to any co-operative society " at less than the appellants' current list prices, not to supply " to persons whose supplies the appellants had decided to " suspend, not to exhibit or export without the consent of " the appellants, and to pay the sum of 5*l*. by way of liquidated " damages for every tyre, cover, or tube sold or offered in " breach of the agreement. The respondents sold a tyre " cover to a co-operative society below the current list price. " In an action for breach of contract, it was proved that sub- " stantially the whole of the appellants' business in these " articles was done through the trade; that in order to prevent " underselling the appellants insisted upon all their trade " customers signing agreements of this nature; and that

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(1) [1915] A. C. 79, 88, 89.

" the probable effect of underselling by any particular trade " customer was to force their other trade customers to deal " elsewhere : *Held*, assuming, without deciding, that the " stipulated sum applied to all the preceding stipulations " in the agreement, that it was liquidated damages." Lord Dunedin said this : " Turning now to the facts of the case, " it is evident that the damage apprehended by the appellants " owing to the breaking of the agreement was an indirect " and not a direct damage. So long as they got their price " from the respondents for each article sold, it could not " matter to them directly what the respondents did with it. " Indirectly it did. Accordingly, the agreement is headed " ' Price Maintenance Agreement,' and the way in which the " appellants would be damaged if prices were cut is clearly " explained in evidence by Mr. Baisley, and no successful " attempt is made to controvert that evidence. But though " damage as a whole from such a practice would be certain, " yet damage from any one sale would be impossible to forecast. " It is just, therefore, one of those cases where it seems quite " reasonable for parties to contract that they should estimate " that damage at a certain figure, and provided that figure " is not extravagant there would seem no reason to suspect " that it is not truly a bargain to assess damages, but rather " a penalty to be held in terrorem." Lord Dunedin then dealt with certain cases, including *Lord Elphinstone* v. *Monkland Iron & Coal Co.* (1) and in a reference to that case in the Court of Appeal, he said this : " . . . . if my view of " the facts in the present case is correct, then Rigby L.J. " would have agreed with me, for the last words of his " judgment are as follows : ' On the other hand it is stated " ' that, when the damages caused by a breach of contract " ' are incapable of being ascertained, the sum made by " ' the contract payable on such a breach is to be regarded " ' as liquidated damages. The question arises : What " ' is meant in this statement by the expression " incapable " ' " of being ascertained " ? In their proper sense the " ' words appear to refer to a case where no rule or measure " ' of damages is available for the guidance of a jury as to the " ' amount of the damages, and a judge would have to tell " ' them they must fix the amount as best they can.' To " arrive at the indirect damage in this case, supposing no sum " had been stipulated, that is just what a judge would, in my " opinion, have had to do."

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(1) (1886) 11 App. Cas. 332.

ROXBURGH J.

1948

BRITISH MOTOR TRADE ASSOCIATION v. SALVADORI.

As the tort of conspiracy, accompanied by many overt acts, has been proved, I must, of course, grant an injunction.

Judgment for the plaintiffs.

The injunction as finally settled by the order was in the following terms: " . . . . that the defendants and each " of them be restrained from doing (whether by themselves " or their servants, workmen or agents or any of them or " otherwise howsoever) the following act that is to say buying " and facilitating the dealing with a motor car (including " a chassis) offered for sale or other disposal by a person " or by the agent of a person known by them to have executed " a deed of covenant with the plaintiffs and to contemplate " breaking such covenant."

Solicitors: *Osmond, Bard and Westbrook*; *S. Myers & Son.*

I. G. R. M.

Affirmed in part and reversed in part. C.A. [1949] 2 All E.R. 985.

Considered. *In re* SCARISBRICK [1950] 1 Ch. 226

Applied. *In re* COULTHURST [1951] 1 Ch. 193

HARMAN J.

1949

Apr. 28; *May* 12.

GIBSON AND ANOTHER v. SOUTH AMERICAN STORES (GATH AND CHAVES) LD. AND OTHERS.

Charity—Profits of company set aside for " Employees' Health and Relief " Fund "—Trust for company's " necessitous " employees, ex-employees and their dependants—Validity—Public element necessary in charitable trust—How far necessary where object is relief of poverty—Power of company to revoke trusts.

By a deed executed in 1918 a company vested a fund, derived solely from its profits, in trustees to be applied for granting gratuities, pensions or allowances to persons who were necessitous and deserving employees and ex-employees of the company, or of its subsidiary companies or agents, and to all the dependants of such persons. The deed gave power to the company to rescind these provisions by special resolution. In 1948, when the company had about five thousand employees, sixteen persons were receiving benefits from the fund, and the calls upon it seemed likely to diminish. The board, under the authority of a special resolution, executed a deed dated August 26, 1948, declaring that the fund was to be held in trust for the company free from the trusts of the deed of 1918, which it thereby rescinded. On the questions whether the fund was held upon a valid charitable trust, and, if so, whether there was a right in the company to revoke it—

Held, (1.) that the trust was for the relief of poverty; that the class of beneficiaries was, for the purposes of such a trust, wide enough to constitute the necessary public element; and that accordingly the fund was held upon a valid charitable trust; (2.) that ever since its incorporation the company had under its articles devoted a part of its profits to a charitable object, and

[Reported by LIONEL LOEWE, Esq., Barrister-at-Law.]

that it had no power to withdraw funds unconditionally devoted to such an object.

In re Compton [1945] Ch. 123 and *In re Hobourn Aero Components Ld.* [1946] Ch. 194, discussed.

ADJOURNED SUMMONS.

South American Stores (Gath and Chaves) Ld., which was incorporated in 1912, conducted a " chain " of stores in the Argentine Republic and had an English subsidiary operating in Chile and local subsidiaries incorporated in Chile and France. Its board sat in England. By art. 134 of its articles of association two per cent. of its profits were to be set aside for the " Employees' Savings and Insurance " Fund," an object amended in 1916 to " Employees' Health " and Relief Fund." On April 14, 1918, the board executed a deed vesting the fund (then about 20,000*l.*) in trustees and declaring, by cl. 3 thereof, that the fund was to be used for granting, at the discretion of the board, gratuities, pensions or allowances to beneficiaries, and by cl. 4 the class of beneficiaries included " all persons who in the opinion of the " London board, are or shall be necessitous and deserving " and who for the time being are or have been in the company's " employ or in the employ of any agents of the company or " in the employ of Gath and Chaves Sociedad Anonima [a " subsidiary company] and the wives, widows, husbands, " widowers, children, parents and other dependants of any " person who for the time being is or would if living have been " himself or herself a member of the class of beneficiaries." By cl. 15 the company was empowered to " rescind, alter or " modify " these provisions by special resolution. Since April, 1918, the fund (with which a fund held under a similar deed by a subsidiary company in Chile was amalgamated in 1938) had been administered in accordance with cll. 3 and 4 of the deed. In 1948, when the company had about five thousand employees and the fund stood at about 105,000*l.*, sixteen persons were receiving benefits from the fund. The calls thereon were much less than its income, and the company had put a contributory pension scheme into operation and intended to establish a non-contributory scheme as well. Accordingly, on August 4, 1948, the company so amended art. 134 as to preclude any further payments into the fund, and thereafter, purporting to act under cl. 15 of the deed of 1918, authorized the board to execute a deed dated August 26, 1948, declaring that the fund was held in trust for the company free from the trusts of the deed of 1918 which it thereby rescinded. The trustees issued this summons to determine (*a*) whether the fund was held on a valid charitable trust; (*b*) if so, whether there was a right in the company to rescind the deed of 1918.

Lindner for the plaintiff trustees.

E. Blanshard Stamp for the defendant company. This is not a valid charitable trust. The company never intended to deprive themselves of the dominion over the fund; they gave themselves power to revoke or alter by cl. 15. The deed was little more than a mandatory set of rules as to how the fund should be administered. By cl. 7 the London board gave itself complete power over the fund. In cl. 4, which set out the class of beneficiaries to be immediately benefited, there was no condition that they should be necessitous or deserving. The trust has no public element. *In re Compton* (1) is no authority for saying that there are exceptions to the general rule that a trust for the relief of poverty must have a public object. In *In re Gosling* (2) members of a firm, company or corporation were held to be a sufficiently public class of the community, but this was overruled in *In re Hobourn Aero Components Ld.* (3) which did not decide that a trust for the relief of poverty, if it had no public element, was saved by the mere fact that it was for the relief of poverty. The "poor relations" cases are anomalous and *Spiller* v. *Maude* (4) was an exception. Here the deed shows that the company had no intention of setting up a charitable trust.

Walton for the defendant beneficiary of the fund. This is a valid charitable trust. The power to revoke does not affect the construction of the deed, on the trusts of which the fund was to be administered until the power was exercised. The question turns on the interpretation of cl. 4, which, if fairly construed, must mean that the objects of the trust were necessitous persons. It is valid because it is for the relief of poverty. This point was left open in *In re Compton* (1) and in *In re Hobourn Aero Components Ld.* (3) in both of which cases the court expressly refrained from overruling *In re Drummond* (5). [He referred to *In re Rayner* (6), *In re*

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(1) [1945] Ch. 123.
(2) (1900) 48 W. R. 300.
(3) [1946] Ch. 194.
(4) (1881) 32 Ch. D. 158 *n.*
(5) [1914] 2 Ch. 90.
(6) (1920) 122 L. T. 577.

Gosling (1) and *In re Lucas* (2).] *Spiller* v. *Maude* (3) was saved only by poverty; the charitable nature of such a trust is not affected unless persons are specified as beneficiaries. *Jones* v. *Williams* (4) laid it down that it was essential for a charitable trust to be for a public purpose. Here the class includes persons who are or have been in the employ of the company. The fact that they can all ultimately trace a relationship to the company does not prevent the class from being public.

Danckwerts for the Attorney-General. *In re Drummond* (5) is the only case which decided that a company's employees were not a sufficiently public class of objects. This point did not arise directly in *In re Compton* (6) or in *In re Hobourn Aero Components Ld.* (7) in which there was a contractual element. There Lord Greene M.R. said that the importance of poverty was that it was a necessary object where the class of trust was prima facie for the personal benefit of individuals. The court should apply that rule here, following the decision in *Spiller* v. *Maude* (3).

Cur. adv. vult.

May 12. HARMAN J., having stated the facts, said: The questions before me are (1.) Whether the fund under the 1918 deed is held upon a charitable trust. (If not so held it is admitted that the trusts are void and that there is a resulting trust of the fund to the company from whom alone the fund has emanated.) (2.) Whether if there is a charitable trust there was any right in the company to revoke it and to resume dominion over the fund.

Before considering whether the trusts are charitable I must construe cll. 3 and 4 of the deed. In my judgment the class of beneficiaries defined in cl. 4 must all satisfy the requirement of being necessitous and deserving, that is to say that poverty is a necessary element to qualify a person for benefit. It was suggested to me that though employees or ex-employees must necessarily be poor yet that qualification did not extend to their dependants. I cannot so construe the deed. In my judgment dependants must be necessitous and deserving just as a member of the primary class of employees or ex-employees must himself or herself be. This then is a fund devoted to the relief of poverty and that of

(1) (1900) 48 W. R. 300.
(2) [1922] 2 Ch. 52.
(3) 32 Ch. D. 158 *n.*
(4) (1767) Amb. 651.
(5) [1914] 2 Ch. 90.
(6) [1945] Ch. 123.
(7) [1946] Ch. 194.

HARMAN J.

1949

Gibson v. South American Stores (Gath and Chaves) Ld.

course is one of the objects of charity set forth in the preamble to the Statute of Elizabeth under the words: "Relief to "aged impotent and poor people." It is the first of the objects enumerated by Lord Macnaghten in *Pemsels'* case (1), where he adopts the classification put forward in argument by Mr. Romilly (as he then was) in *Morice* v. *Bishop of Durham* (2), dividing charity into four categories, first the relief of poverty, secondly the advancement of education, thirdly the advancement of religion, and fourthly other purposes beneficial to the community. These last are described in Mr. Romilly's argument as objects of general public utility. The last three categories embrace the rich as well as the poor. Now charity in its legal sense does not include private charity which in the eyes of the law is benevolence: and so in the celebrated case of *Ommanney* v. *Butcher* (3) a direction to distribute "in private charity" was held not to constitute a charitable trust; and in the case of *Jones* v. *Williams* (4) charity is defined by Lord Hardwicke as a general public use. The public element of charity has been lately emphasized in two cases in the Court of Appeal, namely, *In re Compton* (5) and *In re Hobourn Aero Components Ld., etc.* (6). The former of these cases involved a gift to educate descendants of certain præpositi named by the testatrix, and the judge of first instance felt constrained to hold this a good charity on the analogy of what are known as the "poor relations" cases where relief of the poverty of a man's relations was held to be a good charity. The argument was that if to relieve a relation's poverty be an act of charity so is the relief of his ignorance and (it might have been added) so would be the relief of his ungodliness or want of religion. The Court of Appeal rejected this contention emphasizing that charity must be public and setting apart the poor relations cases upon the footing that they were anomalous and ought not to be extended. The Master of the Rolls said this (after reviewing the cases) (7): "In these circumstances the question arises whether we ought "to extend the analogy of these decisions, so as to cover a "trust of the kind now in controversy. Taking the view "which I have already expressed, I do not think that we "are bound or ought to do so. There may perhaps be "some special quality in gifts for the relief of poverty which

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(1) [1891] A. C. 585.
(2) (1805) 10 Ves. 531.
(3) (1823) Turn. & Russ. 260.
(4) (1767) Amb. 651.
(5) [1945] Ch. 123.
(6) [1946] Ch. 194.
(7) [1945] Ch. 139.

"places them in a class by themselves. It may, for instance, "be that the relief of poverty is to be regarded as in itself so "beneficial to the community that the fact that the gift is "confined to a specified family can be disregarded: whereas "in the case of an educational trust, where there is no poverty "qualification, the funds may at any time be applied for the "purpose of educating a member of the family for whose "education ample means are already available, thus providing "a purely personal benefit and one freed, incidentally, from "the burden of income tax. Failing such a ground of "distinction, I can only regard the 'poor relations' cases "as anomalous, and I prefer to let them remain as such rather "than to extend the anomaly to a different class of case." In the latter case above mentioned the Court of Appeal had to deal with a fund for the relief of air-raid distress among the employees of a certain firm. It was held that there was no element of poverty involved and the court rejected the view that this was a charity for reasons here not material but dealt again with the cases in which trusts which apparently would otherwise have failed for want of a public element were held good because relief of poverty was their object. The Master of the Rolls reviewed the cases and again referred to the poor relations cases in the following terms (1): "In *In re Compton* (2) "I referred to what are commonly known as the poor relations "cases, in each of which, as regards a class of potential "beneficiaries of a strictly private and personal nature, it "had been held in past days that a charitable character "was, nevertheless, attributable to the trust if it was a trust "for the relief of poverty. The cases mentioned in connexion "with this passage in Tudor were not quoted to the court "on that occasion, and if I have any criticism of the decision "in *In re Compton* (2) it is that, in referring to the poor relations "cases as in a category by themselves, I might have added "a reference to the other cases mentioned in Tudor as falling "into the same category. But no authority has been cited "to us which would justify the proposition that what is prima "facie a personal or private trust can be saved except on the "ground that its purpose is the relief of poverty."

He then cites a number of the cases which are set out in Tudor on Charities on the poverty point, and I think I had better perhaps read that passage: "What I have said will "perhaps be made clearer by reference to one or two of the "authorities which were cited. First, there is *In re Clark's*

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(1) [1946] Ch. 204. (2) [1945] Ch. 123.

"*Trust* (1). That was a case of a Friendly Society which was "held not to be a good charitable institution on the ground "that it was a private charity, that is to say, a charity not "recognized as a charity by law. I can get no help out of "that decision except that Hall V.-C. calls attention to this "in connexion with the rules of the society: 'Poverty of "'the member at the time of his sickness or lameness, or in "'his old age, was not required to entitle him to an allowance. "'It appears to me that the society was not a charitable "'institution.' Then comes a decision of Sir George Jessel "in *Spiller* v. *Maude* (2). That case really brings out exactly "the point which I mentioned a moment ago. There was a "society which had every mark of a purely personal association "with no public element in it at all. It was called 'the "'York Theatrical Fund Society . . . . instituted in York "'by the voluntary association and subscriptions of the "'members of the York Company of actors and actresses.' "Under the rules no person save a member of the company "was entitled to any benefit at all. The objects were to "provide the funeral expenses of a contributor dying in "indigent circumstances, the relief of orphan children of "contributors, the supply of medical advice and medicines "to sick contributors unable to pay, and to grant annuities "to contributors becoming incapacited by age, accident, or "other infirmity, from exercising the duties of his or her "profession as an actor or actress and not possessing an "independent income of more than 50*l.* per annum. There "was a case which seems prima facie to lack any element "of publicity and it could not in any sense be described as "being for the benefit of a section of the public. It is true "that the funds of the society were augmented by subscriptions "from non-members, but the important thing about the case "is the way in which Sir George Jessel dealt with it. He "went through the rules and came to the conclusion that the "whole fund was charitable but that the particular charity "had failed. He thought that poverty was clearly an ingredient "in the qualification of members who were to receive the "benefits of the society. It is perfectly clear that he regarded "poverty as the thing that saved it. I must confess, speaking "for myself, that this seems to me to be a very extreme "decision, because the whole arrangement was of a personal "nature. However, it was saved by the fact of poverty."

(1) (1875) 1 Ch. D. 497.

(2) 32 Ch. D. 158 *n.*

Morton L.J. added these words (1): "The third point "is that there is no element of poverty in the present case. "That, of course, does not prevent a trust from coming "within the fourth head of Lord Macnaghten's classification "in *Pemsel's* case (2), but the relevance of it in the present "case is this: where poverty is essential in the qualification "for benefits under a particular fund, there have been cases "where trusts which would appear to be of a private nature "have been held to be charitable. An example of this is the "case of *Spiller* v. *Maude* (3) which has been already mentioned. "The reason, as was suggested by the Master of the Rolls "in *In re Compton* (4) may be that the relief of poverty is "regarded as being in itself beneficial to the community. "That element being absent in the present case, the appellant "cannot rely on these cases." Then: "But I do not feel "inclined to extend the somewhat anomalous line of cases "where poverty has been held to take a trust out of the "category of a private trust and into the category of a trust "which is charitable in the legal sense."

The position therefore on the authorities is now this, that in the second and third and fourth categories of charity as defined in *Pemsel's* case (2) there can be no doubt that a public element is essential but there is at least a suggestion that this is not necessary in the first category. I do not myself feel able to adopt this suggestion. It seems to me a public object is always necessary to make a trust legally charitable and that the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories. The law may well (as the Master of the Rolls suggested in *In re Compton* (4)) consider that to relieve even one man's poverty is a benefit to the whole community while to relieve his ignorance or to minister to his ungodliness is not such a benefit and similarly with the miscellaneous objects in the fourth category. Viewed in this light, is the object here a public object or no? I think it is. The Court of Appeal in both the cases referred to has expressly approved of the decision of Eve J. in *In re Drummond* (5), where he held that a trust for the benefit of the workpeople of a certain company (not being poor people) was a private object. The court also disapproved *In re Rayner* (6), where the same judge (without any argument) held that, the promotion of education being a charitable object, the fact of it being confined to the employees of a single firm did not matter. Now first be it noted that neither of these cases deals with poverty, secondly, both of them were concerned with the employees of a single firm. The present fund is devoted not only to employees but to ex-employees and to the dependants of both classes and also to the employees and ex-employees and dependants of subsidiary companies and of agents of the company. This, as it seems to me, in a poverty case—and I say nothing about any other category—and the class is sufficiently wide to constitute a public element and accordingly I hold this to be a good charity. The class seems certainly to be wider than those mentioned in several of the reported cases dealt with recently in the Court of Appeal, for instance *Spiller* v. *Maude* (1) (members of the York Theatrical Fund Society); *In re Gosling* (2) (old and worn out clerks of a banking firm); *In re Buck* (3) (members of a friendly society and their widows and children).

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(1) [1946] Ch. 210.

(2) [1891] A. C. 531.

(3) 32 Ch. D. 158 *n.*

(4) [1945] Ch. 123.

(5) [1914] 2 Ch. 90.

(6) 122 L. T. 577.

This then being a valid charitable trust, was it competent to the company to revoke it as it purports recently to have done and withdraw the fund from its charitable purpose? In my judgment it was not. It is true that property can be devoted to charity sub modo or conditionally upon the happening of some event; but this fund consists merely of an accumulated proportion of the company's profits which ever since its incorporation has been under its articles devoted to a charitable purpose. I can see no right in the company to revoke this purpose although it may put an end at any time by alteration of the articles, as it has done, to any obligation to subscribe to it in the future. Consequently, I hold that there was no power under cl. 15 of the deed of 1918 so to revoke it as to withdraw funds already devoted to the charitable object from that object.

Declaration accordingly.

Solicitors: *Slaughter & May*; *Treasury Solicitor.*

(1) 32 Ch. D. 158 *n.*
(2) 48 W. R. 300.
(3) [1896] 2 Ch. 727.

VAISEY J.

1949

Mar. 2, 3, 17.

In re CITY OF LONDON PROPERTY CO. LD.'S APPEAL.

War damage—Total loss—Value payment—Method of computation—Site value after damage determinable by reference to hypothetical sale in 1939—*Sale subject to "restrictions" affecting the property—Meaning of "restrictions"—War Damage Act,* 1943 (6 & 7 *Geo.* 6, *c.* 21), *s.* 10, *sch.* II, *paras.* 1, 2.

The appellants' property became a total loss as a result of enemy action on May 10, 1941. The value of the property undamaged was agreed, but the value of the property when damaged for the purpose of computation under s. 10 of the War Damage Act, 1943, was in dispute. The appellants contended that "restrictions" within the meaning of para. 1 (1.) (*c*) (iii) of sch. II extended to all enactments in force on the specified date including Defence Regulations relating to the requisitioning of property and restrictions on building. The value of the property was therefore diminished by the effect of the said Regulations. The War Damage Commission on the other hand contended that the regulations were not "restrictions" within the meaning of sub-para. (iii).

Held, that sub-para. (iii) must be construed ejusdem generis with sub-paras. (i) and (ii), and it included only restrictions which applied to the property in particular and did not include restrictions which applied to all properties in general. The Defence Regulations were not therefore within sub-para. (iii), and the statutory "value" of the property was therefore not affected by their existence.

Held, further that the hypothetical sale on March 31, 1939, by which the value of the property was computed for the purpose of s. 10, sub-s. 2, of the Act must be considered as a sale of the property with its surroundings in the condition they were on that date and not as they were after the damage.

SPECIAL CASE stated by the tribunal for the purposes of the War Damage (Valuation Appeals) Act, 1945.

The appellants, who were the owners of a property known as 14 and 16 Norwich Street, in the City of London, appealed against a determination of the War Damage Commission in respect of that property. The property had belonged to Fenchurch Street Properties Ld., of whom the appellants were the successors in title. The property was a warehouse erected in 1904, of substantial construction, and used for the purposes of a printer's business. On May 10, 1941, the property was so seriously damaged by enemy action that it became a total loss within the meaning of s. 7 of the War Damage Act, 1943. The value of the property undamaged

VAISEY J.

1949

City of London Property Co. Ld.'s Appeal, *In re.*

was agreed at 12,500*l.*, but the value of the property after the damage was in dispute. The appellants contended that on the true interpretation of s. 10 and paras. 1 and 2 of sch. II of the War Damage Act, 1943 (1), the value of the property in its damaged state should be the amount which the vendors might have expected to realize on such a sale of the property as was specified in para. 2 of that schedule immediately after the occurrence of the damage, having reference to the prices ruling on March 31, 1939, as if the building had been demolished by enemy action during a war at a time when the condition of other land and buildings was in the actual condition they were in immediately after the occurrence of the war damage, and when labour and materials for rebuilding were not readily available. They further contended the provisions of regs. 50 and 51 and the restrictions imposed by reg. 56A (as amended by para. 4 of St. R. & O. 1941, No. 437, made under the Emergency Powers (Defence) Acts, 1939 and 1940) of the Defence (General) Regulations, 1939, constituted "restrictions" imposed by an enactment passed before March 26, 1941, within the meaning of para. 1 (1.) (*c*) (iii) of sch. II to the War Damage Act, 1943. On May 10, 1941, in the circumstances then obtaining, it was unlikely that any authorization or licence for rebuilding would have been granted before the expiration of ten years. That factor and the possibility that the site might have been requisitioned under regs. 50 and 51 would have caused a purchaser to reduce the price he would have been willing to pay. They contended that the value of the property in its damaged state should therefore be its value calculated according to paras. 1 and 2 of sch. II, but postponed for ten years, i.e., 2,275*l*.

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(1) War Damage Act, 1943, s. 10, sub-s. 1: ". . . . the "amount of a value payment "shall be an amount equal to "the amount of the depreciation "in the value of the hereditament "caused by the war damage, "that is to say, the amount by "which the value of the hereditament in the state in which it "was immediately after the "occurrence of the damage is "less than its value in the state "in which it was immediately "before the occurrence of the "damage."

Sub-section 2: "For the purpose of computing the amount "of a value payment, the value "of a hereditament in any state "shall be ascertained by reference "to prices current at the thirty-"first day of March, nineteen "hundred and thirty-nine, and "shall be taken to be the amount "which, if the hereditament had "been on that day in that state, "it might have been expected "to realize on such a sale as is "specified in paragraph 2 of the "second schedule to this Act "made on that day."

Schedule II, para. 1. (1): "For the purposes of subsection 2 "of section 7 of this Act, the sale "by reference to which there is to "be ascertained the amount which "the fee simple in a developed "hereditament might have been "expected to realize on a sale "thereof in the state in which "it would be . . . . as a site, "shall be a sale made—(*a*) in the "open market; (*b*) with vacant "possession; (*c*) subject to— "(i) any restrictive covenant, "easement, quasi-easement, or "other right inuring for the "benefit of other land, (ii) any "public right of way, right of "common, or other right inuring "for the benefit of the public "or of any section thereof, and "(iii) any restriction imposed by "or under an enactment passed "before the War Damage Act, "1941, to which the hereditament "was subject at the time imme-"diately after the occurrence of "the war damage . . . ."

Para. (2) (i): "For the purposes "of subsection 2 of section "10 of this Act, the sale "by reference to which the value "of a hereditament is . . . . to be "determined, shall be a sale of "the fee simple . . . . made as "specified in paragraph 1 of this "schedule, so however that the "time to be referred to for the "purposes of heads (*c*) and (*d*) "of sub-paragraph (1) thereof "shall be— . . . . (*b*) as regards "the valuation of the heredita-"ment in its latter state, the "time immediately after the "occurrence of the war damage."

The War Damage Commission alleged that the value of the property in its damaged state was 3,700*l*. Their view was based on the contention that that value should be the amount realized on a hypothetical sale (as specified in para. 2) under the social, economic and political conditions existing on March 31, 1939. They contended further that the aforesaid regulations were not "restrictions" within the meaning of para. 1 (i) (*c*) (iii), and that the value of the property was not diminished on account of any restrictions thereby imposed.

Sir Walter Monckton K.C., *H. B. Williams K.C.* and *C. Hodson* for the appellants. For the purpose of estimating the after-damage value of the property as directed by s. 10, one is entitled to look at all statutory provisions restricting the user of the property in force when the War Damage Act, 1941, came into force. "Restrictions" in sub-para. (iii) of para. 1 (1.) (*c*) of sch. II should be construed as including all such statutory provisions. Regard must therefore be had to certain of the Defence Regulations, such as regs. 50, 51 and 56A, under which building operations were controlled and property was liable to be requisitioned. One can also take into consideration the restriction of development rights under the Town and Country Planning Act, 1932. The existence of these regulations must diminish the value of the property and must be taken into account when considering the amount the property would have fetched at a hypothetical sale in 1939. It would be artificial to value the premises as they would have been if all other buildings were standing. Although regard must be had to prices current in 1939, the surrounding buildings must be regarded as they were on May 10, 1941, after the damage occurred. The Commission should also take into consideration the difficulty of rebuilding in 1941 occasioned by shortage of labour and materials. If regard is had to all these factors the after-damage value of the property will be the amount of the assessment made by the War Damage Committee postponed for ten years, namely, 2,275*l.*

M. E. Rowe K.C. and *H. L. Parker* for the War Damage Commission. Both ss. 7 and 10 direct the valuing authority to take the prices current in 1939, and the hypothetical sale must be computed on the footing as to what the premises might have realized in the open market at that date, other property being in the condition it was in 1939. Any other construction would be illogical. For many years there has been a distinction between restrictions on persons in their use of land and restrictions to which the land itself is subject. The difference is between in personam and in rem. Restrictions under the Building Regulations are in personam, they prevent a person using his land in a particular way. They are not "restrictions" within the meaning of sub-para. (iii) of para. 1 (1.) (*c*) of sch. II. Restrictions in that sub-paragraph mean restrictions on the land itself, they are ejusdem generis with sub-paras. (i) and (ii): *Forsey and Hollebone's Contract* (1). A vast number of defence regulations have been made, many of which would restrict the rights of persons in their use of their land, and might affect its value materially. They are not "restrictions" on the land within sub-para. (iii). Similarly restrictions controlling building operations are restrictions against persons in their use of the land, their purpose is the protection of building materials and not to bind the land: *Maud* v. *Sanders* (2). The same principle applies to the other defence regulations—they are directed against persons in their use of the land. The point of value payments is to give compensation for the war damage to property, measured by reference to a sale in March, 1939. It is not possible to do that if you import later economic conditions. Once you write in wartime conditions, the whole point of the hypothetical sale is lost.

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(1) [1927] 2 Ch. 379.

(2) [1943] 2 All E. R. 783.

Monckton K.C. in reply referred to Slack on War Damage, 2nd ed., p. 356.

Cur. adv. vult.

March 17. Vaisey J. read a judgment in which he stated the facts and continued :

The dispute involves a comparatively small sum of money, but I understand that the action is regarded as being to some extent a test case.

The question which I have to decide may be thus stated : How much of the conditions of the year 1941 are to be written back, as it were, into the conditions of 1939 ; and the answer to that question, as it arises in the present case, appears to turn principally, if not exclusively, on the interpretation of a few words in sch. II to the Act.

[His Lordship read s. 10 and paras. 1 and 2 of sch. II to the War Damage Act, 1943.] Reading ss. 7 and 10 of the Act and paras. 1 and 2 of sch. II to the Act together, it appears to me that the hypothetical sale of the property in question in its state after damage must be considered to have been a sale, effected on March 31, 1939, of such property in the condition in which it was at the moment of time immediately following the occurrence of the war damage (say on the morning of the next day, which was May 11, 1941) subject (among other things) to any restriction affecting the property at that moment of time, or that morning, imposed by or under any enactment passed before the War Damage Act, 1941, that is to say before March 26, 1941, that being the day on which that Act received the Royal Assent.

The point which I have to decide may in my view be further formulated thus : Are the restrictions referred to confined to those which affected the property itself in particular, or specially, and were ejusdem generis with the matters specified under heads (i) and (ii)—which, be it remembered, are restrictive covenants, etc., and public rights of way, etc.—which I understand to be the contention of the War Damage Commission, or do they include (as the appellants would say) such restrictions as affected all other similar property in general, without special application to this property in particular and whether or not they were ejusdem generis with the matters specified under the preceding heads (i) and (ii).

It is, in my judgment, important to bear in mind that it is not strictly accurate to speak of restrictions affecting or imposed upon property. It is the owner of the hereditament who is restricted—restricted, that is, in his freedom to use it as he likes. Some of the restrictions upon him are of a perfectly general character. For instance, the owner of a house may not use it for an immoral purpose, nor so as to create a public or private nuisance; he may not contravene local by-laws in regard to building operations; he may not use it for harbouring the King's enemies or fugitive criminals. That is the first class of restrictions, and no vendor need call a purchaser's attention to their existence.

The other class of restrictions consists of particular restrictions. This class includes the matters enumerated under heads (i) and (ii) of para. 1 (1.) (*c*) of sch. II, to which I have already referred. It also, in my judgment, would include a prescribed building line, a requisitioning order, and similar statutory or departmental restrictions directed against the property itself or the owner of it in particular.

Do the words under head (iii) include the first class or do they include only the second? The risk of requisition is a useful example by which to test the matter. No doubt the existence of the risk was, to some extent, depreciatory, but it was on May 11, 1941, a risk to which all property, or at any rate every warehouse, was subject. So too with regard to the prohibition or limitation of building operations, which undoubtedly on that date would have been a consideration tending to reduce the value to a purchaser of any one of those bombed sites with which we have become so familiar during the last few years. But the consideration was not of special application to this particular property, Nos. 14 and 16, Norwich Street, but applied with equal force to every comparable warehouse or vacant site in the City of London, or indeed elsewhere.

In my judgment, the contention of the War Damage Commission on this point is well founded. Looking again at para. 1 (1.) (*c*) of sch. II to the Act, I find that the hypothetical sale is to be subject under head (i) to restrictive covenants, etc., under head (ii) to rights of way, etc., which are obviously incidents of the tenure of the particular property, peculiar to itself as distinguished from other properties; and it seems to me to follow that the restrictions under head (iii) must likewise be such as are peculiar to the property itself and not the disabilities to which it, or the owner of it, is subject in common with all other properties and owners of property, and of which no express disclosure ought to or need be made to an intending purchaser. If the property had in fact been requisitioned under an order or notice which was operative on May 11, 1941, or if the use of the site had been expressly controlled by some effective direction of a competent authority (such order, notice or direction being made or given under an enactment passed before March 26, 1941), then in my judgment a restriction within the meaning of head (iii) would have existed; but nothing of the kind is alleged in the circumstances of the present case.

The artificial and conjectural hypotheses which I have under this and other comparable legislation to formulate involve considerations which I do not find easy to grasp. I have dealt with what I think was the appellants' main point. I need not refer to the alleged "restrictions" in detail. Regulation 50 enabled certain authorities to carry out works on lands in private ownership; reg. 51 provided powers of requisitioning; and reg. 56A limited the amount of money which it was permissible to lay out upon property—that is to say, upon any property and not this property in particular.

I propose to confine this judgment to the facts of this particular case. The property is not one which is or was at any material time affected by such enactments as the Road Improvement Act, 1925 (see s. 5 as to the prescription of building lines), the Town and Country Planning Act, 1932, the Restriction of Ribbon Development Act, 1935, and the Rent Restriction Acts; but if it were so affected, directly and immediately, and not merely in some remote though imaginable contingency, it may be that such enactments would be held to impose restrictions within the meaning of the head (iii) to which I have in this judgment so often referred. I leave that question open to be decided when, if ever, it arises; but I may in passing refer to the case of *In re Forsey and Hollebone's Contract* (1).

I will deal very briefly indeed with the contention that the sale on March 31, 1939, must be considered as a sale of

(1) [1927] 2 Ch. 379.

VAISEY J.

1949

City of London Property Co. Ld.'s Appeal, *In re.*

the property with its surroundings not in the condition in which they were on that date but in the condition in which they were on May 11, 1941. I will merely say that I am unable to accept that contention.

In the result, I think, that the findings of the War Damage Commission are based on a proper interpretation of the law, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Rooks, Wales, Godwin and Galsworthy; The Treasury Solicitor.*

I. G. R. M.

Approved and affirmed. [1950] 1 Ch. 134

Affirmed. C.A. [1949] 2 All E.R. 1079.

HARMAN J.

1949

May 11, 12.

KITCHEN'S TRUSTEE *v.* MADDERS AND MADDERS.

Bankruptcy—Lease of hotel coupled with sale of goodwill and contents—No consent to lease by building society mortgagee of hotel as required by mortgage—Fraud on tenants by lessor—No payment of rent by tenants—Bankruptcy of lessor—Action by tenants for fraud—Judgment in action for damages to be assessed—Action by trustee in bankruptcy for rent due before and after bankruptcy—Foreclosure summons by building society not recognizing lease or tenants—Assessment of damages in tenants' action for fraud—Amendment by building society of summons by asking for possession only—Claim by tenants to set off damages against rent claimed by trustee—Allegation by tenants of risk of having to pay same instalments of rent once to building society and once to trustee.

The debtor mortgaged a hotel to a building society and subsequently, without the building society's consent, which the mortgage required, demised it (pursuant to an oral agreement to grant a lease and to sell the goodwill and certain contents for 5,000*l.*) for seven years at a rent of 500*l.* a year to the tenants, who paid 2,000*l.* and gave a bill of sale on the furniture for 3,000*l.* Finding on taking possession that the debtor had defrauded them, the tenants issued a writ in the King's Bench Division for fraud, affirming the contract and seeking damages. They never paid rent. When two quarters' rent was due, the debtor was adjudicated bankrupt and later the tenants obtained judgment against her for damages and got the bill of sale set aside. In that action the trustee in bankruptcy obtained a stay and, after the first hearing of a summons by the tenants to remove it, he issued the writ in this action for the two quarters' rent due before the bankruptcy and the three quarters' rent then due after it. The stay was removed on the tenants' undertaking not to prove in the bankruptcy their claim the subject-matter of their action. The building society began foreclosure proceedings by originating summons in which it did not recognize the lease or the tenants as tenants under it. Meanwhile the registrar assessed the tenants' damages for the debtor's fraud at 5,560*l.* 11*s.* 5*d.* and, after the tenants had delivered their defence in this action, the building society amended its proceedings by asking for possession and striking all other claims out of its summons. The claim for possession was against the tenants but treated them as strangers and so could not succeed on originating summons, the correct way to start the action for possession being by writ. The tenants claimed to set off the damages for fraud against the five quarters' rent and contended that they risked having to pay the rent twice over because the trustee was the only claimant through the debtor, who might be put out at any time by the building society, and so lose the right to sue for rent.

Held, in deciding that the trustee was entitled to the five quarters' rent: (1.) that there could be no set-off against the three post-bankruptcy instalments, as to which there was no mutuality between the debtor and the tenants, since they were not due to the debtor at the date of the bankruptcy but became due to the trustee after it: *Alloway* v. *Steere* (1882) 10 Q. B. D. 22 applied. *In re Daintrey* [1900] 1 Q. B. 546, distinguished.

(2.) That there could be no set-off against the two pre-bankruptcy instalments because the tenants, having regard to their undertaking, could neither prove nor claim to prove a debt under the receiving order and therefore did not come within s. 31 of the Bankruptcy Act, 1914, under which there must be mutual dealings between the debtor and any person so proving or claiming to prove.

(3.) That as, on the facts, the building society's proceedings for possession were bound to fail, the issuing of those admittedly ineffective proceedings did not amount to an unequivocal demand for possession, so that the building society had not intervened to an extent demanding that the tenants be protected against possibly having to pay rent twice over: *Moss* v. *Gallimore and Another* (1779) 1 Doug. 279, distinguished.

ACTION by trustee in bankruptcy for rent due under lease granted by debtor. In April, 1947, the defendants, the tenants, orally agreed to buy from the debtor for 5,000*l.* the goodwill and certain contents of a hotel and to take a lease of it from her. By a lease dated May 9, 1947, the debtor, being then mortgagor of the hotel to a building society, demised it for seven years at a rent of 500*l.* a year to the tenants, who paid 2,000*l.* and gave a bill of sale on the furniture for the 3,000*l.* balance. The debtor did not obtain the building

HARMAN J.

1949

Kitchen's Trustee v. Madders and Madders.

society's consent to the grant of the lease, as the mortgage required her to do. Having found, after going into possession, that the debtor had defrauded them, the tenants issued a writ in the King's Bench Division for damages for fraud, affirming the contract and claiming damages. They never paid any rent but retained possession. On December 3, 1947, at which date two quarters' rent was owing, the debtor was adjudicated bankrupt. On January 21, 1948, on motion for judgment in default of defence and without the court's taking any notice of the bankruptcy, the tenants obtained judgment against the debtor for damages, to be assessed, and got the bill of sale set aside. In August, 1948, in that action, the trustee obtained a stay and the tenants took out a summons to have the stay removed. Immediately after the first hearing of that summons the trustee issued the writ in this action for the two quarters' rent due before the bankruptcy and the three quarters' so far due after it. On October 15, 1948, the stay in the King's Bench action was removed on terms, the tenants "by their counsel undertaking not to prove their claim the "subject-matter of this action in the bankruptcy." On October 25 the building society began proceedings by originating summons (in which it recognized neither the lease nor the tenants as tenants thereunder) for foreclosure. On November 4 the district registrar assessed the damages for the debtor's fraud at 5,560*l.* 11*s.* 5*d.* and, on February 8, 1949, after the tenants had delivered their defence in this action, the building society amended its proceedings by asking for possession of the hotel, all other claims in its summons being struck out. That claim for possession was against the tenants treating them as strangers and not as tenants, and so could not succeed as an action for possession had to be started by writ. In the present action, the tenants claimed to set off the damages for the debtor's fraud against the accruing claims for 625*l.* for five quarters' rent: and they contended that they were in danger of having to pay the rent twice, because the trustee was claiming through the mortgagor, the debtor, who might at any moment be put out by the building society and would then have no further right to sue for the rent.

V. R. Aronson K.C. for the trustee. The tenants cannot set off the damages against any of the five instalments of rent. True, they could set them off against the two first instalments

—the pre-bankruptcy instalments—but for their undertaking not to prove in the bankruptcy for the damages, on which the stay was granted: *Jack* v. *Kipping* (1). The right to set off is provided for by s. 31 of the Bankruptcy Act, 1914, whereunder there must be mutual dealings between the debtor and any person proving or claiming to prove a debt under the receiving order. That puts the tenants out of court. Proving or claiming to prove is exactly what they are prohibited from doing, because they have undertaken not to do so, so that, with regard to these instalments, the question of mutuality between them and the debtor is not relevant. As to the post-bankruptcy instalments, *Alloway* v. *Steere* (2) applies. There, a tenant from year to year of a farm to whom at the end of the tenancy the landlord was to pay allowances for tillage and cultivation filed a petition to liquidate his affairs and his trustee carried on the farm for the creditors' benefit until the tenancy was determined. The trustee sued for the value of tillages and cultivation during his tenancy and it was held that the landlord could not, as he sought to do, set off against that claim rent due from the debtor before he filed his petition. Here, it is the damages which is sought to be set off against the rent and that set-off likewise should be disallowed. [He referred to *West* v. *Pryce* (3) and Williams on Bankruptcy, 16th ed., 1949, p. 202.] Here the post-bankruptcy instalments of rent were due not to the debtor, but to the trustee, who stood in the debtor's shoes and was—and is—the landlord. They became due after the bankruptcy. They were not due at its date and so were not then debts under the receiving order. They are not, therefore, the subject of mutual dealings between the debtor and the tenants. Accordingly, in respect of neither the pre-bankruptcy nor the post-bankruptcy instalments can the tenants claim any set-off.

Michael Browne for the defendants. The trustee's contention with regard to the post-bankruptcy instalments is ill-founded. It is admitted that with regard to them he does not rely solely on the undertaking. Therefore, taking the right of set-off to be conceded, all instalments of rent which fell due after the receiving order could still be put on one side of the account: *In re Daintrey* (4). Further, the tenants are in danger of having to pay the same instalments of rent twice over. The trustee, who is in the shoes of the debtor, is prima facie in a position to sue for the rent if it is unpaid: see Law of Property Act, 1925, s. 98. From a practical point of view, however, he should not sue for it, for the building society is in a position to oust the mortgagor, the debtor, at any moment. If it does, it will be entitled to the rent which is in arrear at the time of its notice to the debtor and will be able to distrain for it, *Moss* v. *Gallimore and Another* (1), and it may well happen that the debtor or, rather, the trustee, sues for the rent and obtains judgment for it and, at the same time, the building society distrains for it. Therefore the tenants should be allowed to set off the damages against not only the post-bankruptcy but also, notwithstanding the undertaking, the pre-bankruptcy instalments. [He referred to *In re Ind, Coope, Ld.* (2); *Woolwich Equitable Building Society, Ld.* v. *Preston* (3); *In re Asphaltic Wood and Pavement Co. Lee and Chapman's case* (4).]

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(1) (1882) 9 Q. B. D. 113.
(2) (1882) 10 Q. B. D. 22.
(3) (1825) 2 Bing. 455.
(4) [1900] 1 Q. B. 546.

HARMAN J. The trustee admits that the tenants' claim to set off the damages against the pre-bankruptcy instalments (i.e., the first two instalments) of rent would be good but for their undertaking not to prove in the bankruptcy: *Jack* v. *Kipping* (5). The headnote to that case is as follows: "A "claim for unliquidated damages for a fraudulent representa-"tion made by a bankrupt on the sale of a chattel is within "the mutual credit clause (s. 39) of the Bankruptcy Act, "1869, and consequently may be set off in an action brought "by the trustee for the unpaid price—such fraudulent "representation not being a mere personal tort, but a breach "of the obligation arising out of the contract of sale." Except that the damage has been quantified here, that exactly applies.

As to those two instalments, therefore, the trustee relies merely on the undertaking, to which I will return in a moment. As to the post-bankruptcy instalments the trustee contends that there was no mutuality between the debtor and the tenants. He contends that this was not money which was ever due to the debtor at all, that, at the date of the bankruptcy, the rent had not begun to accrue, that future instalments of rent are not moneys due to a debtor at the date of the bankruptcy, that they became due to the trustee as the landlord and that therefore there is no mutuality. Those contentions, in my judgment, are well founded.

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(1) (1779) 1 Doug. 279.
(2) [1911] 2 Ch. 223.
(3) [1938] Ch. 129.
(4) (1885) 30 Ch. D. 216.
(5) 9 Q. B. D. 113.

Mr. Browne, in his able and persistent argument for the tenants, contended, as I understood him, that on the contrary they were ill-founded, for the following reasons. Once it was admitted, he contended, that there was a right of set-off, though the bankruptcy supervened, the ensuing moneys could continue to be treated as an addition to one side of the account which has to be taken where there is a set-off. I agree that that would be correct if those were moneys due at the date of the bankruptcy but payable later. That, in my judgment, is illustrated by *In re Daintrey* (1) which Mr. Browne cited: there was a contract between two firms of solicitors under which, at the date of the bankruptcy in question, a sum of money then unquantified was owing but payable at a future date, and when the future date came, it was held to be a good subject-matter of set-off. I follow that, but it does not, in my judgment, apply to rent which had not accrued due at the date when the bankruptcy supervened and was therefore not a debt at all.

On the other hand, *Alloway* v. *Steere* (2), cited by Mr. Aronson, is, in my judgment, in point. The headnote is as follows: "A debtor, who was tenant from year to year " of a farm upon the terms that, at the expiration of the " of the tenancy, he should be paid by the landlord allowances " for tillages and cultivation according to the custom of the " country, filed a petition for liquidation of his affairs under " the Bankruptcy Act, 1869, and a trustee was appointed, " who did not disclaim the tenancy, but carried on the " business of the farm for the benefit of the creditors until " the tenancy was determined by notice to quit. The debtor's " estate was sufficient to indemnify the trustee against any " personal liability in respect of the tenancy. In an action " to recover the value of tillages and cultivation by the trustee " during his tenancy, according to the custom :—*Held*, that the " landlord was not entitled to set off rent, accrued due from the " debtor before the liquidation proceedings, against the " trustee's claim." That is almost exactly the converse of the present case. I hold, therefore, that as to the three post-bankruptcy instalments there can be no set-off.

As to the pre-bankruptcy instalments, Mr. Aronson was driven to rely on the undertaking. The right of set-off in bankruptcy is the creature of statute and arises under s. 31 of the Act. Under that section there must be mutual dealings between the debtor and any person proving or claiming to prove a debt under the receiving order.

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(1) [1900] 1 Q. B. 546.

(2) 10 Q. B. D. 22.

In the present case, the tenants, having regard to their undertaking, cannot either prove or claim to prove a debt under the receiving order, and therefore do not come within s. 31. To that contention I see no answer and therefore there is, in my judgment, no right of set-off against either the pre-bankruptcy or the post-bankruptcy instalments.

A further point taken by the tenants is to my mind a most difficult matter. They say: "We are put in peril here of "having to pay the rent twice. You, the trustee, only claim "through the mortgagor (the debtor) who may, at any "moment, be put out by the mortgagee, and will then have "no right any more to sue for the rent at all." Mr. Browne cited s. 98 of the Law of Property Act, 1925, which provides: "A mortgagor for the time being entitled to the possession "or receipt of the rents and profits of any land, as to which "the mortgagee has not given notice of his intention to take "possession or to enter into the receipt of the rents and "profits thereof, may sue for such possession or for the recovery "of such rents or profits" and he contended that the trustee, although claiming through the mortgagor, is not entitled to sue, because in fact notice has been given by the mortgagee (the building society) of intention to take possession. In support of that contention he cited the old case of *Moss* v. *Gallimore and Another* (1) which is still good law and appears in Smith's Leading Cases and the sidenote to which is: "A mortgagee, "after giving notice to the tenant in possession under a "lease prior to the mortgage, is entitled to the rent in arrear "at the time of the notice, as well as to what accrues "afterwards and he may distrain for it after such notice . . . ." Therefore, it was contended, the building society, if it gave effective notice, could give a good receipt for the accruing rent, so that it follows that the tenants are in peril in that way of having to pay the rent twice.

The building society, however, is not recognizing the lease. Had the building society given notice to the tenants to pay the rent to it, the mortgagor (the debtor) and the trustee claiming through her would clearly be out of court. Equally so had the building society unequivocally entered into possession or issued a writ amounting to an unequivocal demand for possession. The building society, however, has not taken either of those steps. It does not wish to recognize the lease and therefore will not demand that the rent shall be paid to it. The result is that the building society's proceedings for possession must be counted as a nullity because it is admitted that they cannot be effective and I cannot think that the issuing of admittedly ineffective proceedings amounts to an unequivocal demand for possession. In my opinion, it is certainly not unequivocal, because, on the facts, the proceedings are bound to fail. Therefore it does not seem to me that the building society has intervened to an extent demanding that the mortgagor be protected against possibly having to pay rent twice over.

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(1) 1 Doug. 279.

In the circumstances that defence cannot, in my judgment, succeed. The trustee is entitled to the instalments of rent for which he asks and there will, accordingly, be judgment for him for 625*l.* and costs. There will be leave to proceed under the Courts Emergency Powers Act.

Judgment accordingly.
Leave to proceed.

Solicitors: *Sidney Pearlman: Gibson & Weldon, for Knowles & Foxcroft, Blackpool.*

K. R. A. H.

WILLIAMS *v.* SHARPE.

C. A.

1948

Dec. 7, 8, 9.

1949

Mar. 3, 4, 7; May 12, 27.

Lord Greene M.R., Somervell and Evershed L.JJ.

Mines and minerals—Compulsory acquisition—Compound settlement—Freehold interests in coal—Compulsory acquisition thereof—Disposal of compensation moneys as between successive tenants for life and remaindermen—Provision under Settled Land Act, 1925, *s.* 47, *for setting aside as capital one-fourth of rents received from mining leases—Coal Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 52), *sch.* III, *part IV, para.* 21 (2).

Under a compound settlement consisting of a will dated October 3, 1863, and some subsequent deeds trust property became settled to the use of two tenants for life successively with remainder to the sons of the second tenant for life successively in seniority in tail male and so that each tenant for life was unimpeachable for waste. The settled property included a number of coal holdings in Glamorganshire. By the Coal Act, 1938, these freehold holdings were compulsorily acquired by the Coal Commission, the vesting date being July 1, 1942, and the compensation payable was duly assessed by the Regional Valuation Board, and the total sum in respect of all holdings amounted to 302,015*l.* 4*s.* 11*d.*, which was paid to the trustees of the settlement. The tenant for life in possession applied under para. 21, sub-para. 2, of the third schedule to the Act for the directions of the court as to the proper method of disposal of the compensation moneys for which a scheme other than that laid down in *In re Duke of Leeds* [1947] Ch. 525, was suggested :—

Held (affirming Jenkins J.'s decision) (1.) that the compensation money in respect of each holding must be dealt with as previously decided by Jenkins J. in *In re Duke of Leeds* (supra) as being in accordance with the provisions of para. 21, in particular sub-para. 2, that the beneficiaries were to obtain "the like benefit . . . . "as they might lawfully have had" from the holding and also the provision that regard was to be had to the period within which coal had been expected to be worked; and (2.) that the words "subject as aforesaid" in proviso (ii.) to sub-para. 2, referred back to proviso (i.) so that otherwise the provision in proviso (ii.) that no part of the compensation should be required or caused to be set aside as capital of the settlement applied to the whole of sub-para. 2.

APPEAL from Jenkins J.

By the will of Rees Williams, dated October 3, 1862, the Aberpergwm estate (hereinafter called the "settled estate") in Glamorganshire, containing certain freehold coal holdings was settled to the use to Morgan Stuart Williams for life with remainder to the use of his first and other sons successively in seniority in tail male and so that each tenancy for life should be without impeachment for waste. Provisions were made for leasing mines and minerals for not exceeding sixty years. The testator died on November 9, 1863. By a disentailing assurance dated January 22, 1896, made by Morgan Stuart Williams and his eldest son, the plaintiff, Godfrey H. J. Williams, and a resettlement dated March 1, 1899, made by the same persons it was appointed that the settled estate should stand limited to the use of Morgan Stuart Williams in restoration of his life estate under the above will with remainder to the use of the plaintiff for life with remainder to the use of his sons successively in seniority in tail male with remainder to the use of the defendant Mervyn G. F. Williams (hereafter called "Colonel Williams") for life with remainder to his sons successively in seniority in tail male and so that each tenancy for life should be without impeachment for waste. By a marriage settlement dated February 22, 1901, the plaintiff assigned unto trustees his life estate in the settled estate upon trust for himself for life his wife and issue as therein mentioned and the trustees were appointed trustees of the compound settlement created as above and power was conferred to the person or persons in whom the powers of the Settled Land Acts were vested to grant mining leases for any term not exceeding 100 years. Morgan Stuart Williams died on December 13, 1909. By a vesting deed dated May 14, 1926, it was declared that the properties then subject to the limitations or trusts of the compound settlement were vested in the plaintiff in fee simple and that Josephine Williams and Stanley Herbert Sharpe were the trustees of the compound settlement. The plaintiff had never had a son, and in the circumstances Colonel Williams was entitled next in succession for life and he had two sons the defendants I. M. Williams and C. I. Williams.

By s. 3 of the Coal Act, 1938, the coal and mines of coal comprised in the settled estate were vested in the Coal Commission on July 1, 1942, and s. 6 provided for the payment and ascertainment of the compensation to be paid. The total values of various holdings of coal and mines of coal in the settled estate, many of them subject to mining leases, was fixed at 302,015*l.* 4*s.* 11*d.* on the assumption that it was paid on June 30, 1942. Owing to the war the final certificate of the values of the various holdings was delayed beyond July 1, 1942. Consequently interest became payable on the compensation money in accordance with s. 7, sub-s. 8, of the Coal Act; and by para. 19 of sch. III to the Act the Commission were empowered to make payments on account of the compensation before July 1, 1942, or after that date until the certification of values had become conclusive. Such payments had been made and apportioned as between capital of the compensation and interest thereon in accordance with para. 19, sub-paras. 3 and 4, of sch. III.

By an originating summons taken out by the plaintiff and dated December 31, 1946, the following ruling was asked for:—

1. That it might be determined whether for the purpose of giving effect to the provisions of para. 21 (2) of the Coal Act, 1938, the compensation moneys paid by the Coal Commission in respect of the coal holdings ought having

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regard to the construction of the said paragraph to be laid out, invested, accumulated, and paid in manner following: (*a*) The compensation moneys to be divided into as many parts as the number of completed years from and after July 1, 1942, during which it was estimated for the purpose of assessing the said compensation that the coal in the said holdings would have been worked. (*b*) Each such yearly part to be the aggregate of the income which it was estimated for the purpose aforesaid would during the relevant completed year arise from the said holdings discounted to July 1, 1942, and apportioned between capital and income in the proportion of one-fourth and three-fourths pursuant to s. 47 of the Settled Land Act, 1925. (*c*) At the expiration of each completed year the trustees were to raise the appropriate capital sum and invest it as if it was capital money and pay and apply the income as if it was income arising under the compound settlement, so, however, that the trustees might raise the sum out of the corpus of the compensation money or out of taxed income coming to hand by reason of the direction for accumulation hereinafter mentioned or partly in one way and partly in the other as they in their absolute discretion might think fit. (*d*) Subject as aforesaid the compensation money to be invested in any investment authorized by the compound settlement and the income thereof to be accumulated at compound interest.

2. Whether the interest on compensation money paid by the Coal Commission as from July 1, 1942, until the date of payment of the compensation moneys should be treated as an accretion to the compensation money and laid out, invested, accumulated and applied accordingly.

Jenkins J. said he felt bound to apply the method adopted by him in *In re Duke of Leeds* (1) rather than that suggested on behalf of the plaintiff. It was contrary to the construction he had then placed on para. 21, sub-para. 2 of sch. III to the Coal Act, 1938 (2), and in particular on proviso (ii) which he had held to be subject to proviso (i) so that subject to that limited provision "no part of the income "of the compensation shall be required or caused by virtue "of this sub-paragraph to be set aside as capital of the "settlement." For the above reason and also because the alternative suggested was open to grave objections on its merits, he must make an order similar to that in *In re Duke of Leeds* (1).

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(1) [1947] Ch. 525.

(2) The Coal Act, 1938, sch. III, para. 21, sub-para. 2, provides: "In the case of a holding that "consists of or comprises an "estate or other interest subject "to a settlement within the "meaning of the Settled Land "Act, 1925, or to a trust for sale "the proceeds whereof are subject "to a settlement by way of "succession, the trustees of the "settlement or any court having "jurisdiction in relation to the "execution of the trusts of the "settlement, and in the case of "the court on the application "of any beneficiary under the

The plaintiff appealed.

D. Bowen K.C. and *I. J. Lindner* for the plaintiff:—

1. Proviso (ii) to para. 21, sub-para. 2, of the third schedule to the Coal Act, 1938, ought not to be construed as prohibiting any accumulations of income of the compensation moneys. Complete effect can be given to this proviso by construing it as a caution that save as provided in proviso (i) to the same

"settlement, may require and "cause the compensation, or the "part thereof attributable to "that estate or other interest, as "the case may be, to be laid "out, invested, accumulated, and "paid in such manner as, in "the judgment of the trustees "or of the court, as the case "may be, will give to the beneficiaries under the settlement "the like benefit therefrom as "they might lawfully have had "from that estate or other interest, "or as near thereto as may be, "regard being had to the terms "of the settlement and to all "relevant circumstances affecting "the premises in which the "holding subsisted, including:— "(*a*) the terms of any subsisting "coal-mining lease and the operation of any provision therein "contained as to undergettings, "shortworkings, and other like "matters; (*b*) the period within "which coal being worked might "have been expected to be "worked out or coal not being "worked might have been "expected to come into working "and to be worked out; and "(*c*) the extent to which, having "regard to those circumstances, "the premises ought to be "regarded as property of a "wasting character: Provided "that—(i) where a payment on "account of the compensation "for the holding has been made "under paragraph 19 of this "schedule before the vesting date; "the net income accruing to the "trustees before the vesting date, "from the investment of the sum "paid, up to an amount sufficient "to make good to the capital "of the settlement the interest "on that sum brought into "account under paragraph 19 "of this schedule against the "capital of the compensation, "shall be set aside as capital "of the settlement; (ii) subject "as aforesaid no part of the "income of the compensation shall "be required or caused by virtue "of this sub-paragraph to be "set aside as capital of the "settlement."

(1) [1947] Ch. 525.

sub-paragraph, nothing in the paragraph is to be read as imposing any obligation to set aside any part of such income to capital of the settlement. This construction is consistent with the power to accumulate expressly conferred by the sub-paragraph, which is negatived or stultified by the construction placed upon proviso (ii) in *In re Duke of Leeds* (1) and *In re Blandy-Jenkins* (2).

2. The mode of disposal directed in *In re Duke of Leeds* (1) (and followed in the present case in the court below) assumes that the annual estimated incomes from the coal holdings in question are equally certain to be produced; these incomes were in fact treated as of increasingly doubtful accuracy as time became more remote in the future, and the compensation was in fact assessed as the aggregate of the values as at July 1, 1942, of each of the estimated incomes for subsequent years which were discounted at different rates having regard to the increasing uncertainty in estimation. It is submitted that these values as at that date ought to be the basis of the mode of disposal and not the uncertain incomes of the future years.

3. The direction that in any event the whole of the income of the compensation for any holding ought to be paid to the tenant for life for the time being in possession would, in the case of a holding which is not estimated to come into working for, say, a period of ten years from July 1, 1942, and is estimated then to be worked for, say, a succeeding period of ten years, operate to give to the tenant for life in possession in the period of non-working a benefit which he would not have got if the holding had not been sold, and such benefit necessarily reduces the amount which the beneficiaries entitled during the period of working would otherwise have obtained. Such a mode of disposal is inconsistent with para. 21, sub-para. 2 (*b*) of the third schedule.

4. The mode of disposal suggested in the summons gives full effect to sub-para. 2 in every respect. It provides for accumulation when appropriate; it provides for distribution in estimated working years only; it has due regard to the actual basis on which the compensation money was ascertained.

5. If it is assumed that the compensation money is impressed as at July 1, 1942, by virtue of the settlement and of the Settled Land Act, 1925, as divisible in the proportion of one-fourth to capital of the settlement and three-fourths

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(1) [1947] Ch. 525.

(2) [1948] Ch. 322.

to tenant for life, the accumulation of incomes of the parts payable to tenant for life is not a setting aside of income to capital of the settlement within proviso (ii), even if the construction put upon that proviso in the cases already mentioned is correct.

Sir Andrew Clark K.C. and *C.S. Dunbar* for Colonel Williams. It is submitted first that the appellant's scheme for the application of the compensation moneys is wrong in principle and should not be adopted; secondly, if it is not wrong in principle it is not a scheme which should be adopted in this case. The judge had a discretion as to the application of the compensation and his discretion should not be disturbed. Further, the appellant's scheme would involve accumulations contrary to the provisions of s. 164 of the Law of Property Act, 1925, and it would be difficult to work in practice. The appellant's scheme is fundamentally wrong because it does not purport to do what the Act of 1938 directs and it involves a departure from the principle laid down in *Askew* v. *Woodhead* (1). The scheme provides for accumulations contrary to the provisions of sch. III, par. 21, sub-para. 2, proviso (ii) of the Act of 1938 which provides that no part of the income of the compensation money shall be set aside as capital. When the compensation money is invested the tenant for life is entitled to the whole interest even though the mines in respect of which it is paid would not have produced any income for 100 years: *In re Robinson's Settlement* (2). The compensation money is capital. All that the scheme adopted by Jenkins J. does is to give to a tenant for life what he would have got if he had sold the mine. It is incorrect to say that a tenant for life could not have obtained anything from an unproductive mine. If he had sold it he would have been entitled to the income of the proceeds of sale.

The court then adjourned to have the question argued as to the scope of proviso (ii).

May 12. *H. A. Rose* for the trustees on behalf of any infant that might be interested. It is contended that Jenkins J.'s construction of proviso (ii) was wrong but not that his decision otherwise was altogether wrong. If he be wrong in not treating the initial words "subject as aforesaid" as applying to the whole of sub-para. 2 it would affect his decision. In *In re Duke of Leeds* (1) the judge's decision was affected by the fetter he felt to be imposed by proviso (ii). He has given a crippling effect to sub-para. 2 by construing "subject as aforesaid" in proviso (ii) as if it were "subject "as last aforesaid" so that the words referred back only to proviso (i). How narrow a construction that involved is shown in *In re Blandy-Jenkins* (2). On this construction he has held that s. 47 of the Settled Land Act, 1925, does not apply to cause a quarter of the yearly income to be set aside as capital.

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(1) (1879) 14 Ch. D. 27.

(2) [1891] 3 Ch. 129.

[Lord Greene M.R. In the case of a mine not to begin to yield coal for ten years and to have a life of only a further ten years, the whole of the compensation relating to that holding should disappear in twenty years, but would it not be right to hold back the income for the first ten years and then to distribute the whole in the following ten years ?]

I adopt that argument and suggest that it accords with *Askew* v. *Woodhead* (3) but in order to comply with s. 47 of the Settled Land Act, 1925, a quarter of the income must be set aside as capital.

C. S. Dunbar for Colonel Williams' two sons, adopted that argument.

Sir Andrew Clark K.C. for Colonel Williams. Proviso (ii) on the true view prohibits the requiring of income to be set aside as capital. That is because it operates to prohibit the exercise of the discretion in sub-para. 2 by requiring or causing income to be set aside as capital. The words "subject "as aforesaid" in proviso (ii) clearly apply only to proviso (i) as Jenkins J. has held. Even if there was a discretion it would not be right for the court to exercise it. There remains the question whether proviso (ii) operates to prevent accumulation of income during a period when a mine, if not sold, would have produced no income. The object of para. 21, sub-para. 2, is to produce the same effect as under s. 74 of the Land Clauses Act, 1845, and s. 79 of the Settled Land Act, 1925, namely, to let the tenant for life take the whole income. The only power to say that a tenant for life was not to get the whole income might be if a mine became temporarily unproductive. Having regard to proviso (ii) it seems right to say that the tenant is to receive the whole income of the compensation money. The same applies where a mine may not be working for ten years. The tenant for life cannot in such a case get nothing. It was largely to meet such a problem that proviso (ii) was inserted and the intention and effect is that subject to proviso (i) the tenant is none the less to receive the income. That is reasonable because the compensation money is not a wasting asset as mines are and the fund is not being depleted by giving the income to the tenant for life. Therefore I say when a mine is not worked for ten years and it yields coal only for another ten years, proviso (ii) must be given its widest effect and no accumulation of income made. Any accumulation of income for payment at a further year would make it payable as capital so that the accumulation would amount to a setting aside of income for capital contrary to proviso (ii). The judge was right in the view he took in *In re Duke of Leeds* (1).

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(1) [1947] Ch. 525.
(2) [1948] Ch. 322.
(3) 14 Ch. D. 27.

Bowen K.C. said his interest was the same as that of Sir Andrew Clark on this point.

Cur. adv. vult.

May 27. LORD GREENE M.R. The judgment which Evershed L.J. is about to read is the judgment of the court prepared by Somervell L.J.

EVERSHED L.J. The plaintiff in the present proceedings, being tenant for life under a settlement which comprised coal holdings compulsorily acquired under the Coal Act, 1938, took out an originating summons for the determination of the question how the compensation received under that Act should be disposed of by the trustees under para. 21 of sch. III to the Act. The construction and effect of that paragraph had been considered by the learned judge from whose decision this appeal is brought in two previous cases, *In re Duke of Leeds* (1), and *In re Blandy-Jenkins* (2). All interested parties were represented and such provisions of the settlement as are relevant are set out in the learned judge's judgment and need not be repeated. Mr. Bowen on behalf of the life tenant submitted to the learned judge a method of disposing of the compensation money radically different from that adopted by the learned judge in the *Duke of Leeds* case (1). The learned

(1) [1947] Ch. 545.

(2) [1948] Ch. 322.

judge while regarding himself bound by his previous decisions in respect of any matter of principle involved in those decisions, considered the argument on its merits and rejected it. The same, or substantially the same, submission was made by Mr. Bowen to this court which was, of course, free to consider the earlier decisions of Jenkins J. In addition to what we may call the main submission, other questions arose, which we will consider and deal with later.

Under the Coal Act, 1938, the fee simple in all coal and mines of coal was vested in the Coal Commission as from July 1, 1942, the vesting date. The compensation for the holding was to be a sum representing the value in the open market, arrived at in the following way. The Act in s. 6, sub-s. 3, provided that a sum of 66,450,000*l.* should be the aggregate amount payable in respect of the coal hereditaments acquired. This, as is known, was arrived at on the basis, as settled by an arbitration, of fifteen years' purchase of the average total royalty income. Under s. 6, sub-s. 4, a Central Valuation Board was to allocate this sum among valuation regions covering the whole country. Individual holdings were then to be valued in the different regions on an open market basis. These individual valuations if their total was more than the regional allocation were adjusted down; if less, as here, were adjusted up, so that the regional allocation, no more and no less, was to be distributed to the owners. Claims had to be made in a prescribed form which we refer to later. The valuations were to be made by Regional Valuation Boards with a right of appeal to a referee. That is the scheme in broad outline. It is unnecessary to deal with it in greater detail as it is fully set out in the judgment of Jenkins J. in the *Duke of Leeds* case (1). We are concerned with para. 21 of sch. III to the Act which deals with the disposal of compensation as between beneficial interests in cases where the holdings acquired were subject to a settlement. This paragraph is on lines similar to s. 74 of the Land Clauses Act, 1845, and s. 79 of the Settled Land Act, 1925. Apart from such statutory provisions money received on the sale of a wasting asset would become capital of the settlement. The present paragraph, like the sections referred to, is designed to give to the trustees a discretion to deal with the money so that the rights of tenants for life in successive years and the rights of remaindermen, inter se, in the compensation money shall bear as near as may be the same ratio to each other as if the asset had not been sold.

(1) [1947] Ch. 525.

Paragraph 21, sub-paras. 1 and 2 of sch. III are as follows: "(1.) The compensation for a holding when paid by the "Commission to the person entitled to receive it from them, "including any sum paid on account thereof under paras. 19 "or 20 of this schedule, and the income thereof, shall, in order "to its being applied as compensation to the persons whose "interests are comprised in the holding, be held and disposed "of for the benefit of those persons, or their personal "representatives or assigns, in accordance with the succeeding "provisions of this paragraph." [His Lordship read sub-para. 2, and continued:]

In order to understand the arguments it is necessary to set out the nature of the evidence before the court on which the learned judge's scheme and Mr. Bowen's operate. Under Statutory Rules and Orders, 1938, No. 1592, coal owners had to submit estimates of the value of their various holdings on forms scheduled to the order. It is unnecessary to go into detail but estimates of output and royalty income in future years had to be made and submitted covering the whole estimated life of the mine. The claims as so made out in respect of the present holdings went before the Regional Valuation Board and in two cases there was an appeal to the referee. There were in some cases reductions, and we have an explanatory note from Mr. Lynch Blosse, mining engineer and adviser to the trustees and the plaintiff, who attended the proceedings on their behalf. It is sufficient to say that in some cases with absolute accuracy and in others with substantial accuracy, the court has before it the figures of estimated income for each year of the estimated lives of the different holdings on which the Board or the referee based the amount of compensation awarded. We will briefly illustrate the procedure by one or two examples. Those who prepared the claim for one of the holdings, G. M. 740, estimated, for reasons that are given, nine successive variations in income over one hundred years, the estimated life of the mine. For example, a substantial drop in output was estimated in 1952 on the partial exhaustion of the five seams. In 2020 the existing lease expired. The Board accepted the nine periods and made some, though not large, reductions in the figures submitted. For example, the average royalty figure under the existing lease was taken in the claim at 8*d*. The Board reduced this to 7.648*d*. When the lease had to be renewed in 2020 the Board forecast a reduction of royalty rate to 6*d*. Before considering the method by which the compensation figure is calculated, those figures as accepted by the Board represent, as it seems to us, evidence of the "benefit" which beneficiaries in successive years might "lawfully have had" from this holding, assuming there was no question of setting aside as capital a proportion of the royalty income. If a proportion had to be set aside this would have to be taken into account. In arriving at the figure to be paid as compensation these annual sums were discounted back to the vesting date at varying percentage rates. For example, the "certain rents" were discounted back over the 100 years at rates varying from 6 per cent. to 8 per cent., the surplus income at rates varying from 8 per cent. to 10 per cent. It will be seen that this whole method differs from the method of arriving at a purchase price by taking so many years' purchase of an estimated future income. The estimated variations in future years, the varying dates at which current leases expired might anyhow have made such a method difficult to apply. It also seems a reasonable surmise that the method laid down was adopted in order to assist trustees in carrying out the task imposed on them by para. 21 of sch. III to the Act. There was no evidence as to how the discounting percentages were arrived at. It seems again a reasonable surmise that they were worked out so as to produce in the case of an average royalty holding a figure in the neighbourhood of fifteen years' purchase of the average income, which was the basis of the global figure. The results of these percentage reductions were shown in two exhibits in respect not of individual holdings but of the totals of the various holdings. The settlement being one in which one-quarter of the royalty income had to be set aside as capital money, the totals for each year are so divided between capital and income. The discounted value of an income sum of 19,666*l*. for 1960 is 4,922*l*., of an income sum of 10,805*l*. for 2042 is 115*l*. The sum of these figures so discounted represented the compensation.

The difference between the learned judge's method and that submitted by Mr. Bowen can be most easily stated by considering a case in which none of the royalty income has to be set aside as capital. We will assume such a case in which the whole life of the mine is covered by an existing lease with uniform terms and that on the evidence there was no ground for assuming any reduction of output. On this basis the estimate of income from the first to the last year will be the same, say 10,000*l*. The learned judge, " assuming " that the compensation moneys not distributed at any given " moment will earn 3 per cent. (less income tax), would direct " the trustees to distribute the available funds so that the same " sum would be available in each year from the first to the last. " There would be a uniform abatement of the estimated " royalty income throughout the period " of the estimated life of the mine. In the case we have assumed, where no part of the income has to be set aside, the fund would then be exhausted. In other words, the compensation money has wasted as the mine was expected to waste. The sum available in each year is of course substantially less than the estimated royalty income, but on the learned judge's method the sum is the same sum in each year. Mr. Bowen's scheme can be illustrated by taking two years, say 1960 and 2000. In arriving at the compensation figure the 10,000*l*. estimated royalty income for 1960 will have been discounted back to the vesting date at, say, about 7 per cent., and the figure for the year 2000 at about 9 per cent. We take approximate figures from the documents before us. These discounted figures for all the successive years of the life of the mine can be ascertained, their total making up the figure of compensation. Each of them on Mr. Bowen's scheme is notionally segregated and invested. When the year for which a particular figure was estimated arrives the investments so earmarked are realized and distributed with the interest they have in fact earned. The tenant for life in 1960 will get the then value of the investments made with 10,000*l*. discounted at 7 per cent. back to the vesting date, with actual accumulations from that date. The tenant for life in 2000 will get the value of the investments made with 10,000*l*. discounted back at 9 per cent. with accumulations. It will at once be seen that under this system life tenants in the early years get a larger proportion of the estimated royalty income than life tenants in later years. Some figures were worked out in the course of the argument showing that in 1943 a life tenant would get over two-thirds of the estimated royalty income, in 1964 about one-third, and in 1984 about one-sixth.

We agree with the learned judge that his method is, and Mr. Bowen's is not, in accordance with the provisions of para. 21. The beneficiaries are to obtain " the like benefit " . . . . as they might lawfully have had " from the holding.

One thing seems to us clear. In any given year the output of coal on which the return to a tenant for life will depend is unaffected by the fact that, in arriving at an open market price for coal, future income from a source such as coal royalties is discounted at a far higher percentage than that earned by money in trustee securities. But in Mr. Bowen's division of the compensation money the early life tenant benefits by this fact. It therefore, as it seems to us, is not having regard to the benefit which would have been received if there had been no sale but is having regard to the amount of the purchase price referable to each successive year's estimated return. This is a wholly different conception, which words could easily have been found to express. We think the provision that regard is to be had to the period within which coal might have been expected to be worked out also supports the learned judge's view. If, as here, there is uncontradicted evidence that certain annual sums may be anticipated over a period on the footing that the compulsory purchase had not taken place, then to repeat the learned judge's language, "the sub-paragraph quite clearly points "to a uniform abatement of the estimated royalty income "throughout the period." We would also record our agreement with the learned judge's view as expressed in the *Duke of Leeds* case (1), that to decide otherwise would be inconsistent with the decisions to which he refers on similar words in earlier enactments. We have nothing we wish to add on what is said about those decisions. The learned judge in rejecting Mr. Bowen's scheme relied in part on proviso (ii) of para. 21. It seems to us that the argument fails before that proviso is reached.

We will now deal with the other issues which do depend on the construction of proviso (ii). We have described the first step in the learned judge's scheme by which the total compensation fund consisting of capital and assumed interest is spread over the life of the mine so as to secure a uniform abatement of estimated royalty income. How is regard to be had to a provision that a proportion of the royalty income arising in each year would have had to be set aside as capital? Prima facie one would set aside the required fraction of the sum allocated to each successive year. The two provisoes on which the argument turns are as follows: [His Lordship read them and continued:] The purpose of proviso (i) is clear.

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(1) [1947] Ch. 525.

Paragraph 19 (iii) provides that a payment on account before the vesting date, with interest at 3 per cent. less income tax up to that date, is to be treated in account as a payment on account of the capital of the compensation. Proviso (i) follows logically on this provision. In considering the effect of proviso (ii) there are three cases: (1.) when there is existing royalty income at the vesting date; (2.) when the mine is not in working at that date, but is estimated to come into working at a certain year in the future; (3.) where the coal is not in working and it is impossible to estimate a date, the coal being valued on an acreage basis. The learned judge expressed his opinion on proviso (ii) in the *Duke of Leeds* case (1) and also in *In re Blandy-Jenkins* (2). I will read a passage from the former case (3): "If a proportion of the "royalty income derived from the holding in any year, had "it remained subject to the settlement instead of being "compulsorily acquired, would, in view of s. 47 of the Settled "Land Act, 1925, have been liable to be set aside as capital "money arising under the settlement, the like proportion "(in this case one-fourth) of the abated royalty equivalent "for the same year must be similarly set aside, but, in view "of the prohibition against the capitalization of income "contained in the proviso to para. 21, sub-para. 2 (which I "regard as exempting the income of the compensation from "accumulation except in so far as there may be an obligation "to accumulate by virtue of the actual limitations of the "settlement itself in any particular case), not exceeding "the amount, if any, of the capital supplement for that year. "Any amounts so set aside and the future income thereof "will thenceforth cease to be subject to the special provisions "applicable to the capital and income respectively of the "compensation." In the course of the hearing we felt some doubt as to the scope and effect of this proviso, particularly in the case of a mine estimated to come into working at a future date. The hearing was therefore adjourned in order that these matters should be fully argued. Mr. Rose submitted first that the learned judge in coming to the conclusion as set out in the paragraph just read, was misconstruing the words "subject as aforesaid." The learned judge, as is clear from other passages, read them as referring and referring only to proviso (i). Mr. Rose submitted that they referred to the whole of the sub-paragraph. This does not seem to us a possible construction. The wording of the proviso itself shows, we think, that it is intended to prohibit something which might have been proper or thought to have been proper under the sub-paragraph apart from the proviso. On this point Sir Andrew Clark referred us to the summary of his argument in *In re Blandy-Jenkins* (1), as set out by Jenkins J. (2). That represented the argument that he desired to put before us in this case. The learned judge accepted that argument and we agree with his conclusion.

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(1) [1947] Ch. 525.
(2) [1948] Ch. 322.
(3) [1947] Ch. 525, 552.

We have so far been assuming a mine in working at the vesting date. We will now consider a mine estimated to come to working at a certain year in the future. There is a "dead" period. It may be said that interest accumulated over the dead period is not set aside finally and irrevocably as the capital of the settlement. The argument can be well illustrated by a holding B.C. 10 in the present case. The coal was expected to come into working in 1958, and to be exhausted by 1968. Any income therefore accumulated up to 1958 would be distributed, subject possibly to retention of one-quarter, by 1968. The accumulations as such would not be set aside finally as capital of the settlement. In certain contexts the words being considered might be construed as not covering accumulations during the "dead" years for the reason indicated above. On the other hand, the words "setting aside as "capital of the settlement" are clearly capable of covering an accumulation in the dead period, irrespective of whether the "capital" so accumulated may subsequently in whole or in part be distributed in annual payments to tenants for life. The same words occur at the end of proviso (i). There, as it seems to us, they are plainly used to cover what is accumulated irrespective of whether it may be in whole or in part distributed annually after the vesting date to tenants for life. The words in proviso (i) are applicable although the mine may be expected to be worked out in three years, and there may have been no proportion of royalty income to be set aside. The words cannot be limited under proviso (ii) in a way which plainly cannot apply to the same words in proviso (i).

We agree with the learned judge that the effect of the proviso is to give the tenant for life the income of the compensation fund over the dead period. When the estimated period of working arrives, the ordinary scheme will apply. In a case where no estimate can be made of the date of working, the trustees must clearly distribute the income. There is only one very small sum of this kind in this case, and no point has been taken with regard to it. It is unnecessary, therefore, to consider what other problems, if any, might be raised with regard to sums of this kind. Jenkins J. in the *Duke of Leeds* case (1) said that the method he adopted was not necessarily the only possible method of giving effect to the paragraph. This may be so. The question in the present appeal is whether the order of the learned judge is in accordance with the paragraph. In our view it is, and we would therefore dismiss the appeal.

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(1) [1948] Ch. 322.

(2) Ibid. 333–335.

Appeal dismissed.
Leave to appeal.

The question whether the National Coal Board ought to be ordered to pay the costs of the appeal was then considered.

LORD GREENE M.R. We are all of opinion that this is a case where the court has jurisdiction to order the National Coal Board to pay these costs. The argument of Mr. Bonner for the Coal Board was to this effect: the application to the Court of Appeal was not requisite because the matter had been decided by the trial judge, that all that was requisite was to take out a summons in the Chancery Division and to carry it as far as the court of first instance, and that after that there was no power to charge costs on the National Coal Board. In my opinion that is much too narrow a reading of the provisions of para. 22 in sch. III. The phrase is, taking out the relevant words, " costs reasonably incurred . . . . in " connexion with any application to the " court that may be requisite." Although there were other decisions of the court of Jenkins J., already in existence, an application to the court was quite clearly requisite. The argument of Mr. Bonner would mean that the costs of an appeal against the decision on that application would not " be the costs in connexion with " the application. I cannot read the words of the legislature in that narrow sense. The object quite clearly was to leave the recipient of the compensation in such a position that he would get his compensation

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(1) [1947] Ch. 525.

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free of the expense of ascertaining what he was to get. The legislature, in my opinion, must have realized that any application to the court might be appealed and that any costs incurred in connexion with such an application would include costs of an appeal provided one requisite is there. The overriding provision, which is the safeguard of the Coal Board against frivolous appeals, or anything of that kind, is the provision that the costs must have been reasonably incurred. If the incurring of costs of an appeal is an incurring of costs in connexion with an application to the court, which I think it is, the question then is, on the facts of each individual case: were the costs of such an appeal reasonably incurred?

In the present case the position was this. The language of the schedule dealing with the distribution of compensation leaves a considerable latitude of discretion, and Jenkins J. said more than once, and I am sure was right in saying, that it does not follow that one method is the only method of dealing with a given situation. That being so the question here was whether a different method to that adopted by Jenkins J. in the previous cases was within the four corners of the Act. That seems to me to be a matter which was a perfectly fair matter for an application notwithstanding the decisions of Jenkins J. Jenkins J. is the only judge who has had to deal with these very complicated and very difficult provisions of this Act. It is not like a case where you have perhaps half a dozen decisions of six judges of first instance all deciding independently of one another. It is a case where one judge, following what he had already done before in two cases, has come to a decision. It is quite clear to my mind that if one went back to the first of those decisions the costs of an appellant in such a case would have been costs in connexion with the application to Jenkins J., and it would have been reasonable for the appellant to carry the matter of this very complicated Act at any rate as far as the Court of Appeal. Having regard to the fact that I have mentioned, that the only decision is a decision of a judge of first instance and that the matter is one of very great complication and one which, in my opinion, it was fair and reasonable to litigate as far as the Court of Appeal, I come to the conclusion that the costs here have been reasonably incurred in connexion with an application to the court which was requisite. In my opinion the Coal Board ought to pay all the costs of this appeal as between party and party.

SOMERVELL L.J. I agree.

EVERSHED L.J. I agree.

Costs of all parties as between party and party to be paid by the National Coal Board.

Solicitors: *Ashurst, Morris, Crisp & Co.* for plaintiff; *Pennington & Son* for all defendants other than National Coal Board; *Solicitor for the National Coal Board.*

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Evershed M.R., Somervell and Jenkins L.JJ.

In re MANNERS

PUBLIC TRUSTEE *v.* MANNERS AND OTHERS.

Will—Bequest of sum to pay specified annuity—Previous covenant by testator to pay annuity of same amount to same person—Direction in will to pay just debts—Satisfaction—Bequest in will not in satisfaction of contractual liability.

A direction by a testator for payment of his just debts is prima facie sufficient to rebut the presumption that a covenant made by him during his lifetime for payment of a life annuity is satisfied by a direction in his will to purchase out of part of his estate a like annuity for the same person.

Chichester v. *Coventry* (1867) L. R. 2 H. L. 71, and a passage in Bowen L.J.'s judgment in *Horlock* v. *Wiggins* (1888) 39 Ch. D. 142, laying down the weight to be attached to a testator's direction to pay debts in rebutting the presumption of satisfaction, applied.

In re Hall [1918] 1 Ch. 562, and *In re Hargreaves* (1890) 44 Ch. D. 236, distinguished.

APPEAL from Wynn-Parry J.

By his will dated July 28, 1944, Henry James Manners, after appointing the public trustee to be his executor, directed that all his just debts and funeral and testamentary expenses should be paid, and continued: "I give and bequeath 5,000*l.* "to purchase an annuity of 250*l.* per annum, less income tax, "for Amelia Martha Manners, the balance of this 5,000*l.* after "the purchase of this annuity of 250*l.* per annum, less tax, "I give and bequeath to my grandchildren, that is the children "of my son Eric James Manners." Then after giving and

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bequeathing a number of legacies, the testator gave and bequeathed his residue in four equal parts, one part for his said son, one part for his said grandchildren to be applied as therein mentioned, and the remaining two parts for different hospitals.

The person to whom the annuity was given (hereinafter called Mrs. Manners) had been formerly the husband's wife but the marriage was dissolved on June 10, 1929. By a deed of covenant dated February 17, 1937, and made between the testator and Mrs. Manners in full settlement of her claim to maintenance, the testator covenanted for himself, his executors and administrators to pay as from October 1, 1936, to Mrs. Manners during her life the yearly sum of 250*l.*, less income tax, by equal monthly payments, the first payment to be deemed to be due on November 1, 1936; and Mrs. Manners thereby released any claim under an earlier deed of covenant. On March 25, 1948, a summons was issued by the public trustee asking whether upon the true construction of the will, the bequest of 5,000*l.* to purchase an annuity of 250*l.*, less tax, for Mrs. Manners operated to satisfy the obligation of the testator's estate under the deed of covenant, or whether Mrs. Manners was entitled to be paid both the annuities.

Wynn-Parry J. held that Mrs. Manners was entitled to both the annuities. Persons and bodies representing the two hospitals appealed.

Newsom for the appellants. In this case it is sought to apply the old equitable doctrine of satisfaction which takes its roots from *Talbot* v. *Shrewsbury* (1). On that doctrine a number of exceptions have been grafted which have been thought to be crystallized. It is suggested that this approach is erroneous and that this court though bound by the principle is not bound by the exceptions. The exception to the principle on which the appellants' case failed in the court below is in *In re Dowse* (2) where an annuity of 10*l.* a year was not satisfied by a gift of 30*l.* a year during widowhood.

[Evershed M.R.: If a testator expresses no intention to satisfy an obligation by a bequest, it is difficult to see why he should be assumed to be doing so.]

That is contrary to the principle of satisfaction as laid down. It is true, however, that the principle has been considerably disapproved, but it is simpler to apply the gift of an annuity

(1) (1722) Prec. Ch. 394.

(2) (1881) 50 L. J. (Ch.) 285.

to a previous annuity, than a legacy to a previous debt. He, the testator, had bound his executors to pay the annuity covenanted to be paid; he might well wish by his gift to relieve them of a continuing liability. The latest case of the kind to come before the Court of Appeal is *Horlock* v. *Wiggins* (1).

[EVERSHED M.R.: Bowen L.J. there states that any opportunity should be taken to avoid the application of the artificial principle.]

Here the testator was giving his residue partly to his son and grandchildren, and partly to charity, but directs 5,000*l.* to be set aside to get rid of the liability of an annuity.

[SOMERVELL L.J.: The testator uses the words "I give and bequeath" in regard to the sum of 5,000*l.*, which suggests a beneficial gift.]

Cases in support of the present contention are *In re Hall* (2) and *In re Hargreaves* (3) as showing that the existence of a direction to pay debts does not prevent the application of the principle of satisfaction.

[SOMERVELL L.J. referred to *Atkinson* v. *Littlewood* (4), as showing the materiality of a direction to pay debts and *Chichester* v. *Coventry* (5).]

Other authorities are *In re Horlock* (1) and *In re Rattenberry* (6), which deal with the question whether the time-lag in payment of an annuity prevents the principle of satisfaction from applying. That was the ground of Wynn-Parry J.'s decision in the court below.

[EVERSHED M.R.: We all feel disinclined to consider that as we feel that the presence of a direction to pay debts is so strongly in your path.]

On that special reliance is placed in *In re Hargreaves* (3). Further an annuity is not strictly a debt as there pointed out and in *In re Hall* (2).

Raymond Jennings K.C. and *R. Lionel Edwards* for Mrs. Manners.

[EVERSHED M.R.: As this point has not been before the Court of Appeal for so long, the court would like to be told anything further in point.]

It has never been doubted that a direction to pay debts in a will sufficed to prevent the principle of satisfaction from applying. See *In re Huish* (1) and *Hawkins on Wills* (3rd ed.) p. 347, where the matter is fully discussed. The only question in the court is whether the views of Kay J. in *In re Huish* (1) and Bowen L.J. in *Horlock* v. *Wiggins* (2) were right as to the effect of a direction to pay debts.

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(1) (1888) 39 Ch. D. 142.
(2) [1918] 1 Ch. 562.
(3) (1890) 44 Ch. D. 236.
(4) (1874) L. R. 18 Eq. 595.
(5) (1867) L. R. 2 H. L. 71.
(6) [1906] 1 Ch. 667.

McMullen (for *Geoffrey Cross K.C.*) for the public trustee. *Newsom* replied.

EVERSHED M.R. This appeal raises a question of the application of what has been called the rule as to the satisfaction of debts by legacies. Mr. Newsom has indeed said that the rule, which has admittedly become somewhat shabby by reason of the disapproval expressed upon it, ought now by this court to be given a new stimulus and clothed anew with vigour. The rule (and I quote it as I find it in *Theobald on Wills*, 10th ed., p. 541), is that where a legacy is given to a creditor of the testator, "the legacy, if of equal or greater "amount, is prima facie considered a satisfaction of the debt." And, says Mr. Newsom, the onus is on the creditor to show some ground in the particular case for inferring an intention on the part of the testator to give a bounty by will in addition to the obligation existing by contract. The rule, which, as I have said, has not been favoured by the courts, has in consequence no doubt become in the course of time subject to exceptions, which by reason perhaps of their artificiality have not themselves been the subject of much encomium. However, the main question in this present case is whether on the facts of the case the rule (which has certainly been established for a very long period of years) does or does not apply. [His Lordship then stated the facts, and after reading the terms of the gift and bequest of 5,000*l*. continued :]

I should interpolate here, first, that having regard to the age of Mrs. Manners when the testator died, the purchase price of the annuity would be some 3,000*l*. odd, so that there was, if the annuity were bought, a substantial balance on which the remainder of the language of the bequest would operate ; and secondly, that "the children of my son Eric James Manners," would be grand-children of the testator by the named son, who was a child of his former marriage to Mrs. Manners.

It is unnecessary to read the rest of the will, but I observe

(1) (1889) 43 Ch. D. 260.

(2) 39 Ch. D. 142.

that the form of it is that there follow a number of pecuniary legacies, each and every one of them introduced by the same formula, "I give and bequeath," and that, finally, he "gave "and bequeathed" his residue in shares to various persons and corporations. The appellants represent two charities who were entitled to shares of residue and who would therefore stand to gain if Mrs. Manners accepted the provision in the will in satisfaction of the testator's covenant. The substance of the argument on behalf of the appellants is that the annuity bequeathed by this will was on the face of it of the same amount exactly, 250*l.* per annum, less tax, as the subject of the contractual obligation; and, therefore, that the rule would, prima facie, apply. And it is said there is nothing in this will which takes it out of the rule. Mr. Newsom has referred to several cases, including *Horlock* v. *Wiggins* (1), which appears to be the last case when this subject matter was discussed in this court. I turn to it at once because of certain language there used by Bowen L.J. In that case by a deed of separation a husband had covenanted that on his decease his estate should pay to his wife, should she survive him, 100*l.*, with a proviso that if 6*l.* per month was paid to her for six months from his death, the balance should only be paid at the end of that period. The relevant words of the will set out in the head-note were: "after all my just debts, "funeral and testamentary expenses are paid, I bequeath "to my wife 100*l.* payable within six months after my decease, "6*l.* to be paid to her or her order until my estate is finally "settled, the same to be deducted from the said 100*l.* as per "indenture stated in our mutual separation". It is to be noted that the deed and the will were substantially contemporaneous, and that was a matter strongly relied on by the Court of Appeal. But Bowen L.J. in deciding against the application of the general rule in that case founded himself also on the circumstance that the will there, as in the present case, immediately before the relevant bequest directed payment of debts—and I observe that it is "debts" and not "debts and "legacies." Bowen L.J.'s language is this: "The will directs "payment of the bequest after payment of the testator's "just debts, and the 100*l.* in the separation deed was a debt "existing when the will was made." In that passage Bowen L.J. clearly indicated that that circumstance is one which is of great importance, to put it no higher, to a decision whether or not the rule applies.

(1) 39 Ch. D. 142.

I think from a consideration of other cases, and of the text-books, that it seems tolerably clear that a direction for payment either of debts and legacies, or of debts simpliciter, is treated as being, whether or not artificially—and I do not think it is particularly artificial—something which prima facie takes the case altogether out of the rule. It is perhaps convenient to cite the passage which Mr. Jennings referred to in *Hawkins on Wills*, 3rd ed., p. 347. It is stated there in the form of a rule: "A direction by the testator that his debts and "legacies should be paid, is sufficient to rebut the presumption "that a debt is satisfied by a legacy." The learned author then deals with the distinction at one time thought to have existed between a direction to pay debts and legacies, and a direction to pay debts simpliciter. In the same connexion I will refer to one other decision, which was in fact a decision the other way. It is a decision of Malins V.-C. in *Atkinson* v. *Littlewood* (1). That was a case in which the benefits given by the legacy were really identical in all respects with the subject of the obligation, which was, as here, to pay an annual sum or annuity. In the course of his judgment the learned Vice-Chancellor referred to the House of Lords case of *Chichester* v. *Coventry* (2) as being an authority for the view that a direction for the payment of debts did have the effect of taking out of the operation of the rule a case where there was a legacy to the creditor. He said this (3): "This being, then, a settled "rule, I am not at liberty to depart from it unless I can clearly "satisfy myself that there is such an intention in the will "as to warrant me in coming to a different conclusion. If "this testator had directed his debts to be paid, and then had "given this annuity, I should have found sufficient warrant, "because that is the very point decided in *Chichester* v. "*Coventry* (2)."

In my judgment, therefore, it must now be treated as settled that a direction of this kind does have the effect stated. By way of answer to that point, however, Mr. Newsom has said that the obligation which existed under the deed of 1937 at the date of the death was not in strictness a debt, or was not a debt within the formula in this testator's will. I am afraid I cannot agree with him. It is, of course, true that if at the date of the testator's death, there was not a monthly instalment then unpaid, there was nothing immediately owing

(1) L. R. 18 Eq. 595.
(2) L. R. 2 H. L. 71.
(3) L. R. 18 Eq. 595, 604.

for which Mrs. Manners could sue. But the effect of the covenant was that month by month, so long as Mrs. Manners lived, there came into existence obligations in debt which could have been enforced against the estate, as they could have been enforced against the testator. It seems to me impossible to say that a direction to pay debts was not intended to comprehend all kinds of contractual obligations to which the testator's estate was subject. Mr. Newsom referred to, and relied upon, a decision of Astbury J., in *In re Hall* (1). He went so far as to say that if we were to hold that the direction in this will to pay debts applied to the obligation under the deed of 1937, and accordingly operated to take this case out of the general rule, then we must disapprove, if not overrule, the decision in *In re Hall* (1). But this does not seem to me to be so. *In re Hall* (1) was a somewhat special case; for by the ante-nuptial settlement in that case a husband had settled certain property on trust so that the wife enjoyed the income; and he had covenanted with the trustees that if his wife survived him his executors would yearly during her life pay to the trustees a sum sufficient to make up the income to 1,000*l.* per annum less income tax. By the terms of the will the testator left his estate so that the income went to the wife, and the fact was that the income from the estate added to the income of the settled property brought the latter up to a figure considerably in excess of 1,000*l.* in every year. The real question in the case was whether the directions the testator gave by his will operated to fulfil and perform the obligations entered into by the ante-nuptial settlement to make up the income of the settled fund to 1,000*l.* a year less income tax. The learned judge held that they did. I cite one passage from the judgment (2): "The real question here is whether the "direction to pay the income of the 'clear residuary estate' "to his wife—it is quite true it is not through the medium "of the trustees, but to her direct—ought to be regarded in "the events that have happened, there being ample money "for the purpose, as a performance in fact of the covenant "entered into three years before his will. The doctrine of "satisfaction, strictly so called, as distinct from performance "applies to a legacy to a creditor, in which case, the legacy, "if of equal or greater amount, is prima facie considered to be "a satisfaction of the debt. This general rule has often been "disapproved, but it is a binding rule upon the court today."

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(1) [1918] 1 Ch. 562.

(2) Ibid. 566.

I think by that passage the learned judge indicated that *In re Hall* (1) was not in strictness a case of the same kind as the case which is now before us. But the particular significance of the case from the point of view of the appellants is that in the course of it, Astbury J. dealt with the point that the will had contained a direction to pay debts, and that therefore by the presence of that direction the presumption of satisfaction was rebutted; with the result that the widow could claim both the benefit of the obligation under the settlement and the benefit under the will. The learned judge held that the direction would not cover, and could not fairly be said to cover, the kind of obligation that might arise under the settlement, if, but only if, it turned out that there was anything to pay the wife to make up her income to 1,000*l.* per annum. It seems to me that there is a world of difference between an obligation to pay 250*l.* per annum by equal instalments, and an obligation that if an income does not reach a certain figure then that deficiency will be made good. In the latter case it is plain that at any given point of time you cannot say whether there is or is not in the future going to be any obligation on the estate at all. It is merely a contingent liability. It seems, therefore, to me that *In re Hall* (1) is wholly distinct from the present case. But the language used by the learned judge which I have read seems to me to support and confirm the view that I have ventured to express, that where you have an obligation to pay debts then that direction prima facie, at any rate, takes the case out of the general rule.

In the same connexion Mr. Newsom also cited *In re Hargreaves* (2). That case again seems to me to be quite different from the present. The question in *In re Hargreaves* (2) was whether a person who was entitled to an annuity could prove for the value of the annuity against the estate of the covenantor, not confining himself to the actual accrued liability but claiming to value the whole annuity and future obligations thereunder, and then to prove for that sum as though it were a debt presently payable.

It seems to me that on the authorities the presence of the direction to pay debts applies to take this case out of the general rule, and that direction must be taken to cover the obligation under the deed of 1937. It would, of course, have been open to Mr. Newsom to show that other passages in the will indicated a contrary intention, and that in this case the testator meant that the benefit under the will should be taken conditionally upon its being treated as a satisfaction of the debt. It seems to me, however, that further examination of the will leads entirely in the opposite direction. I refer particularly to the fact that what is here given is not an annuity of an amount equal to the contractual annuity. It is not even a direction to the executors to provide a sum equivalent to such an annuity. It is a bequest of a sum of money out of which the annuity is to be purchased, and the balance of it is then given to other persons. That seems to me an indication against satisfaction, for the testator is not merely, so to speak, providing out of one and the same source, namely, the residue of his estate, a testamentary annuity in addition to the contractual annuity. He is in effect providing something like a settled legacy, setting aside for all purposes (whether indeed there be satisfaction or whether there be not) a sum of 5,000*l.* in which the residuary legatees will have no interest whatever. No case has been cited in which the doctrine of satisfaction has applied where the legacy is an interest in a sum set aside altogether, and for all purposes, from residue. I regard that as an element strongly supporting the view that there is here no intention that the legacy should operate in satisfaction of the obligation.

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(1) [1918] 1 Ch. 562.

(2) 44 Ch. D. 236.

I add, finally, that the use of the words " give and bequeath," to which I have already alluded, which is adopted throughout the will in relation to each benefaction, seems to me to support the view that what the testator intended was to give his wife a benefit under his will apart from and quite regardless of any contractual obligation he might be under by virtue of the covenant. For these reasons it seems to me that the appellants here fail to make out a case for the application of the rule, and I certainly can see no ground on the authorities that have been cited to me for giving to the rule, which as I have indicated has been many times disapproved, a new stimulus now.

Wynn-Parry J. placed particular reliance on a matter to which I have not found it necessary to allude, namely, that there were differences in the times of payment, and in the respective dates upon which the annuitant could enforce her right. On that point the learned judge followed the decision of Hall V.-C. in *In re Dowse* (1). That point may provide another ground for supporting the view which I take. But for my

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(1) 50 L. J. (Ch.) 255.

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MANNERS, *In re.*

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part I prefer to rest my judgment on the grounds which I have stated, and to say nothing one way or the other upon the question of times of payment and the soundness of the decision in *In re Dowse* (1). For these reasons, in my judgment the conclusion of the learned judge was right, and this appeal must fail.

SOMERVELL L.J.: I agree.

JENKINS L.J.: I also agree.

Appeal dismissed.

Solicitors: *Drysdale, Lamb & Jackson; E. W. Parkes for Farrington & Winterton, Brighton; W. J. Woodhouse & Co.*

(1) 50 L. J. (Ch.) 255.

H. C. G.

Applied. BAXTER *v.* ECKERSLEY. [1950] 1 All E.R. 139.

Applied. BAXTER *v.* ECKERSLEY [1950] 1 K. B. 480

In re SAVOY ESTATE LD.

REMNANT *v.* THE COMPANY.

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June 15, 16.

Evershed M.R., Somervell and Jenkins L.JJ.

Company—Debenture holders' action—Receiver—Bailment—Claim by two parties on separate summonses—Summonses heard together—Res judicata against one party in respect of furniture claimed by other party—Claim by receiver to property—Duty of receiver as officer of the court.

In 1907 Mr. and Mrs. R. were living in Mayfair and were friends of F. to whom Mr. R. was indebted. F. purchased their furniture but shortly afterwards the R.s went to live at Hatfield taking the furniture with them. R. subsequently formed a company and the furniture passed into the company's hands and was used to furnish a new hotel. Later the company got into difficulties and in 1940 judgment was obtained in a debenture holders' action and a receiver appointed. When the receiver applied for leave to sell this and other furniture, Mrs. R. took out a summons in the action, claiming part of the furniture on the ground that F. had given her the furniture he had bought from her and her husband and that she had lent it to the company at her husband's request. The Court of Appeal held that while the purchase of the furniture by F. was shown the gift of it to her was not established. On another summons by Mrs. R., taken out on

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SAVOY ESTATE LD., *In re.* REMNANT *v.* THE COMPANY.

March 22, 1945, claiming this and other furniture, Evershed J. held that the matter was res judicata except as regards the additional furniture, as to which he allowed the summons to proceed. On July 27, 1945, F.'s personal representatives took out a summons claiming the furniture as to which Mrs. R.'s claim had been held to be res judicata with the intention, should they recover it, of delivering it over to Mrs. R. The two summonses were heard together and Mrs. R.'s claim failed, while that of the personal representative succeeded. The plaintiff debenture holder and the receiver appealed.

Held, (1.) that the appellants could not resist the personal representatives' claim on the ground that F. had given the furniture to Mrs. R. and at the same time rely on the plea of res judicata against Mrs. R. If the appellants chose to rely on estoppel as against Mrs. R., they must themselves be affected by it.

(2.) That the receiver being the person in possession of the furniture had set up no title of his own but only the title of Mrs. R. If then this claim was a proper one, he must, as an officer of the court, deliver over the furniture to Mrs. R.; and if he had set up a fictitious title, the claim of the personal representatives must prevail. So far as the plaintiff debenture holder was concerned, it was for him to prove his title to the furniture and this he had failed to do.

APPEAL from Vaisey J.

In November, 1907, a Mrs. O. F. Remnant was living with her husband, Ernest Remnant (whose surname was then Schenck), at 1, Curzon Street, Mayfair, and they were then on terms of great friendship with Mr. (afterwards Sir) Ernest (commonly and hereinafter called Charles) Friswell to whom Mr. Remnant was then indebted in a large sum of money. Sir Charles Friswell purchased the furniture at 1, Curzon Street, of which an inventory was prepared, for the sum of 500*l*. which was applied in paying off part of Mr. Remnant's indebtedness. Shortly afterwards Mr. and Mrs. Remnant with their children moved to a house at Hatfield and took the furniture with them. Afterwards Savoy Estate Ld. was formed by Mr. Remnant and acquired a house at Birchington called Beresford Lodge which was opened as a hotel and called the Beresford Hotel. The furniture in question then passed into the possession of the company and was used to furnish the hotel. Later the company got into difficulties and a debenture holders' action was instituted to enforce the claims of the holders of three series of debentures. Judgment in this action was obtained in 1940 and a receiver appointed. The War Department requisitioned the company's hotel in 1940, and the furniture there was stored. The receiver having applied for leave to sell the company's furniture, Mrs. Remnant took out a summons claiming the furniture then in store. The claim proceeded on the footing that this furniture was furniture described in an inventory taken in a black book (being exhibit O.F.R.1) which had been given to her by Sir Charles Friswell and afterwards lent by her at the request of her husband to the company for use in furnishing the Beresford Hotel until the company should acquire sufficient furniture of its own. The court thought it desirable that Mrs. Remnant should be given leave to inspect the furniture removed from the company's hotel. This she did, and as a result identified as being included in the exhibit O.F.R.1 certain items which she specified in an exhibit O.F.R.4. She then took out a second summons claiming the furniture specified in the exhibit O.F.R.4. Uthwatt J. decided this claim in Mrs. Remnant's favour, but on an appeal the Court of Appeal held that there was no sufficient evidence that the furniture was hers to establish her claim and the summons was dismissed. On March 22, 1945, Mrs. Remnant issued a third summons by which she claimed the furniture specified in an exhibit O.F.R.7, a copy of the previous exhibit O.F.R.1 which had then been lost. On an application to stay this proceeding Evershed J. held that as regards the furniture specified in the exhibit O.F.R.4 the matter was res judicata, but that the summons so far as it related to other furniture might proceed. The summons was amended accordingly so as to cover only the furniture specified in the exhibit O.F.R.7 which had not been included in O.F.R.4. On July 16, 1945, another summons was taken out by the personal representatives of Sir Charles Friswell claiming the furniture specified in the exhibit O.F.R.4 in regard to which Mrs. Remnant's claim had been held to be res judicata.

These two summonses were heard together by Vaisey J. who held that the claim by Mrs. Remnant on the amended summons was not established. He said that as regards the furniture to which Mrs. Remnant's claim had been held by Evershed J. to be barred, he was left to choose between the claims of the company and the claim of Sir Charles Friswell's representatives, and he thought that of the representatives must prevail, seeing that Sir Charles Friswell was known to have purchased the furniture and that no explanation was given of how the furniture came into possession of the company other than Mrs. Remnant's story of its having been borrowed.

The plaintiff debenture holder and the receiver appealed.

Ungoed-Thomas K.C. and *J. A. Reid* for the appellants. In 1944 when the Court of Appeal discharged the order of Uthwatt J. it was on the ground that there was a lacuna in the evidence of Mrs. Remnant and that she had not established that the furniture in question had in fact been given to her by Sir Charles Friswell. The principle of res judicata applies to prevent her now claiming that furniture. The appellants contend that the evidence in the present proceedings however does establish that in fact the furniture was given by Sir Charles to Mrs. Remnant. Vaisey J. has found that there was such a gift. The appellants accordingly can allege that the personal representatives of Sir Charles have no title to this furniture. There is nothing unconscientious in the receiver of the company making such an allegation. He referred to Spencer Bower on Res Judicata, p. 125, para. 193.

J. A. Reid in the same interests. So far as the form of these proceedings is concerned, that was dealt with by Evershed J. in his judgment in 1945. Here there were two separate actions to determine. There was no need for the personal representatives of Sir Charles to set up any estoppel as against Mrs. Remnant, as she had withdrawn her claim. If her summons had come on for hearing first the appellants would have defeated her claim. Mrs. Remnant and the personal representatives of Sir Charles were content that the two proceedings should be heard together. There is nothing unconscientious in the receiver using the evidence put in by the other side. The effect of Mrs. Remnant's evidence is to defeat the claim of the personal representatives. No question of estoppel in fact arises.

Pascoe Hayward K.C. and *Lindner* for the personal representatives of Sir Charles Friswell. It is important to see what facts were proved before the Court of Appeal. The appellants then prayed in aid the title of the personal representatives of Sir Charles. They admitted that they accepted the furniture from Mrs. Remnant as bailees. They could not dispute her title without alleging a better title. It is submitted that the right conclusions to be drawn from the evidence in the previous proceedings is: first, that the appellants were in the first instance Mrs. Remnant's bailees;

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secondly, that the receiver could only resist her claim as bailor to delivery of the furniture by admitting the superior title of the personal representatives of Sir Charles. It is only on the footing that their title was admitted that the decision of the Court of Appeal is explicable. If a bailee sets up the title of a tertius to defeat the claim of the bailor this amounts to attornment to that tertius on whose title the bailee is relying. The possession of the appellants became wrongful directly they refused to deliver up the furniture. *Rogers, Sons & Co.* v. *Lambert & Co.* (1); *Cornish* v. *Searell* (2). Sir Charles Friswell's executors in bringing these proceedings had accepted an unequivocal act of attornment consisting of the appellants setting up their title against Mrs. Remnant. Apart from any question of attornment, when a bailee sets up the claim of a tertius by way of defence, the court must accept the claim of that tertius as being good, unless there be someone else who claims the property in question. It would be different if the company had an independent title.

[Somervell L.J. referred to *Rogers'* case (1) and said he was puzzled as to what was meant by eviction by title paramount.]

It refers to the case of a third party to whom property belongs coming and evicting the bailee. That is the possibility here because the company has no independent title.

If the court be against the respondents on the question of attornment then it is claimed that the company as bailees cannot resist the claim of a third party by setting up the title of a bailor, whose title they have successfully resisted. It has been proved that Sir Charles Friswell bought the furniture that his executors are now claiming and the claim by Mrs. Remnant that Sir Charles had given her the furniture has been defeated, it follows that the executors' claim must stand as against the appellants who admittedly have no title of their own, as soon as the right of the tertius is pleaded there must be some legal relation between the bailee and the tertius.

[Somervell L.J. referred to *Betteley* v. *Reid* (3).]

The executors in bringing the claim are doing so for the benefit of Mrs. Remnant, the validity of whose claim to have been given the furniture by Sir Charles they recognize. It is submitted that it would be unconscionable to allow the receiver to take the furniture for the benefit of the debenture holders. If the receiver had settled with Mrs. Remnant, he could say he had got her title but to rely on her title and at the same time set up the plea of res judicata against her would be unconscionable.

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(1) [1891] 1 Q. B. 318, 328.
(2) (1828) 8 B. & C. 471, 476.
(3) (1843) 4 Q. B. 511.

Ungoed-Thomas K.C. replied.

Evershed M.R. This appeal is somewhat remarkable and intricate in many respects. I emphasize that, because, though many points of interest to the lawyer have been raised in the able arguments which have been addressed to us, this case, like most cases, falls to be determined in my judgment upon its own very peculiar facts. The first matter to which I draw attention is that the proceeding before the court arises by way of an appeal from an order of Vaisey J. made upon two summonses tried by him together in a debenture holders' action. The company concerned is the Savoy Estate Ld. The plaintiff is a debenture holder, and the present appellants are that debenture holder, a Mr. Randall, and Mr. Lloyd Price, who was appointed by the court as long ago as March, 1940, to be receiver of the undertaking of Savoy Estate Ld. comprised in the debentures. The respondents to the appeal are three persons, namely, a Mrs. Remnant and a Lady Friswell and Mr. Ashforth, the second and third respondents being the personal representatives of Sir Charles Friswell, deceased. Those are the parties involved in the matter and, as I have indicated, the respondents are before the court as persons coming into the proceedings by way of summons in a debenture holders' action.

The subject matter in dispute is some furniture. Mr. Ungoed-Thomas has assisted us by conceding that we need not trouble with matters of identity. Therefore, I can state quite shortly the essential facts about the furniture. The furniture which is claimed by one or both of the summonses in question is comprised in an exhibit which has been called O.F.R.7 and which I will hereafter refer to as Exhibit 7. That exhibit is in fact a copy made by a Mr. Mann some years ago of an inventory which has unhappily been lost. Whether all the items in Exhibit 7 now still exist does not matter and may be doubtful, but part of the items in Exhibit 7 consist of items covered by another exhibit, called O.F.R.4, which I will refer to as Exhibit 4. So far as I am aware, it is not in dispute that the items in Exhibit 4 do exist. There was a question whether certain of them, an inkpot made in the likeness of greyhounds and a champagne cooler, for example, were or were not covered by the larger list Exhibit 7, but Mr. Ungoed-Thomas has abandoned any claim he might have to the effect that they were not so included.

The furniture was many years ago the subject of certain transactions which took place between Mrs. Remnant and her husband on the one side, and Sir Charles Friswell on the other. For present purposes, though I may have to refer a little more in detail to these matters hereafter, it is sufficient to say that in the year 1907 this furniture was bought by Sir Charles Friswell. It is said that Sir Charles Friswell gave it to Mrs. Remnant, and much has turned, during the nine years of litigation that has so far followed the appointment of the receiver, on the question whether that assertion is or is not, for some purposes or for all purposes, proved; but it appears to be established quite clearly to my mind that the furniture was in fact lent by Mrs. Remnant, acting on whose behalf for the moment matters not, to Savoy Estate Ld. in order that it might be used by that company as part of the furnishings of an hotel called the Beresford Hotel at Birchington. The furniture having thus arrived at the hotel, misfortune appears to have fallen on the affairs of the company, which, I should interpolate, had been the promotion of Mr. Remnant, now deceased, and when the present proceedings began in 1940 the furniture was in fact, as I understand, stored in a warehouse.

The first material matter to which I must allude—for I can, I think, omit some of the earlier applications and orders made in the action—is that Mrs. Remnant at the end of the year 1943 preferred a claim for the return to her or for the delivery up to her of the furniture which she said existed and was comprised in Exhibit 4, and she issued a summons in the action asking for an order against the plaintiff and the receiver for such delivery up. That application came before Uthwatt J. who found in her favour. I am not clear whether at that date the original inventory had been lost, but, however that may be, the application, as it was litigated before Uthwatt J., was limited to the smaller lot of furniture in Exhibit 4, and the learned judge made an order for the delivery up of that furniture only. The claim had been supported by affidavit evidence on the part of Mrs. Remnant, and on that evidence the judge made the order, but the present appellants appealed to the Court of Appeal. They based their case in the Court of Appeal on the ground that there was a lacuna in the evidence which Mrs. Remnant had put forward, that lacuna being that she had failed to establish the last link in the chain, i.e., the gift from Sir Charles Friswell to herself. That argument prevailed in the Court of Appeal.

In view of some of the argument which has been put forward in this court, I must, I think, refer briefly to the judgments of the Master of the Rolls and Morton L.J. in that case. Finlay L.J. did not deliver a separate judgment. The Master of the Rolls started his judgment as follows: "I have no doubt whatever that Mrs. Remnant, in putting "in a claim to this furniture, is acting in the perfectly honest "belief that the furniture is hers. What the court has to "consider is whether the evidence which she puts before "the court in support of her claim is sufficient to establish it." Then he deals with the case put before the court by Mrs. Remnant, and at the end of the next paragraph he says: "She carries the matter as far as the sale to Sir Charles "Friswell. All the rest of her evidence amounts to is a "suggestion that she regarded the furniture as her own. "That is quite insufficient to establish a title based on a "gift"; and Morton L.J., to the same effect, said: "The "applicant, however, wholly fails to make any such statement" —namely, that the gift was made—" in her affidavit." So the basis of the decision of the court was that she had failed to prove her case. That having been the result of the appeal, Mrs. Remnant then thought she would have a second attempt to make good her claim and issued another summons claiming the furniture again. On July 11, 1945, that summons came before me, sitting as a judge of first instance, and the present appellants, not unnaturally, took the point that this matter had been determined and that, according to the ordinary principles of res judicata, Mrs. Remnant could not litigate again the same question on which she had already been defeated. The judgment which I then delivered has been referred to and it is quite unnecessary for me to refer to it again, save only to say this, that I took the view that Mrs. Remnant was estopped from litigating afresh her claim to the furniture against the same persons, but that that estoppel was limited to the subject matter of her first claim, namely, the contents of Exhibit 4, and that if she were able to prove ownership

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of other items of furniture, that would be a wholly different cause of action and she could litigate that part of the claim she sought to make. I therefore gave her liberty to amend her summons, which she did, and that summons thereafter became and has remained an application for delivery up to her of so much of the furniture in Exhibit 7 as is not included in Exhibit 4.

In order that I may dispose of that matter at once, when that claim came to be tried before Vaisey J. the learned judge found that she had failed to identify any items of property constituting Exhibit 7 minus Exhibit 4, and on that ground he dismissed her application. But some five days after the summons had been before me, there entered, perhaps to the surprise of the present appellants, two new characters into the litigation, namely, the personal representatives of Sir Charles Friswell, who on July 16, 1945, issued a summons against the present appellants. They said in effect, and say now in effect : " You, the receiver and the debenture " holder, have managed to defeat Mrs. Remnant by persuading " the Court of Appeal that she had proved purchase by " Sir Charles Friswell, but had failed to prove a gift from Sir " Charles Friswell to her. Now here we are. We are " Sir Charles Friswell and the furniture belongs to us." To that the present appellants made answer : " No ; against " you we shall prove a gift by Sir Charles Friswell to " Mrs. Remnant." At first sight, of course, that does seem an almost Gilbertian situation. Here were the appellants who had rebuffed claimant A. by saying she had established title in claimant B. and was thereafter estopped from again asserting her own title, and then turning round immediately afterwards to claimant B. and saying : " No ; we will now " rebuff you by proving title in claimant A., whom we have " just disabled from making any effective claim against us." As my brother Somervell pointed out in the course of the argument, res judicata may work in mysterious ways and that may be the effect of it : but, as I shall hope to show, I think that, as this matter has developed, there is perhaps a relatively simple answer to the appellants' case. It will be observed, and I formulate it because it has been the basis of Mr. Ungoed-Thomas's argument, that here there were two independent claims ; first, a claim by Sir Charles Friswell's personal representatives for furniture comprised in Exhibit 4 ; and second a claim by Mrs. Remnant for furniture comprised in

Exhibit 7 minus Exhibit 4, and that in meeting those claims there was no inconsistency in the receiver and the debenture holder saying: "On the facts, a gift is proved to Mrs. Remnant "of everything. That therefore defeats the personal repre- "sentatives and would entitle Mrs. Remnant to succeed "if she could identify any furniture which answered the "description of Exhibit 7 minus Exhibit 4"; but the two summonses being, as I have already stated, summonses in the debenture holders' action, were dealt with together. When they came on before Vaisey J., it seems from the shorthand note, that there was no attempt to keep the two claims separate for the purpose either of leading evidence or of argument. Mr. Pascoe Hayward and his then junior appeared for all three persons. The heading of the shorthand note itself makes it quite plain that no distinction was made between the claims when the evidence was taken, and the same solicitors appeared for Mrs. Remnant and for the executors. But the matter goes even further than that—and this is significant: Mr. Pascoe Hayward said in the court below, and he has made it quite plain here, that he does more than represent the co-applicants; he is an ally and champion of Mrs. Remnant and appears in the proceedings with the benefit of her indemnity as to costs, and he has said from the start that any furniture he recovers comprised in Exhibit 4 he will immediately hand over to Mrs. Remnant.

It seems to me that, when the facts are looked at and those matters to which I have just referred borne in mind, the real situation is that the severance of the claims really disappears as an effective point in the case and that the court ought to look upon this matter as one in which there are, on the one side, three persons as claimants, claiming between them certain furniture, and, on the other side, the debenture holder and the receiver resisting that claim. True it is that the form of the summonses had limited the individual claimants to specific items, but the case was, as I have said, tried and the whole evidence was led upon the footing that the whole of the claims were being dealt with together. The importance of that seems to me to lie in this, that the question of res judicata, to which I have referred, is, after all, a rule of evidence. In any proceedings between Mrs. Remnant on the one hand and the present appellants on the other, if my judgment in July, 1945, was correct, both Mrs. Remnant and the appellants were estopped, if they chose to rely on

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the estoppel from asserting a gift from Sir Charles Friswell to Mrs. Remnant. That, as it seems to me, placed the appellants in something of a dilemma. If they chose to rely upon the estoppel, then they must themselves be affected by it. In a proceeding relating to this furniture to which Mrs. Remnant was a party they themselves were as much disabled as Mrs. Remnant from setting up this point, and it may well be, if I appreciate the reasoning correctly, that it was upon that ground that Vaisey J. really decided the present case in favour of the respondents, because he made no finding in regard to the gift, but stated that the question whether there was a gift was one that he thought could not now be raised at all. Having so decided, then he held that the title being established in Sir Charles Friswell's executors, it was conclusive in their favour and that the furniture must be handed over to them accordingly. If, on the other hand, this matter of a gift was open—and it is quite clear, when one looks at the evidence, that it was treated as established or admitted for all purposes at the hearing—then, as it seems to me, the whole basis of the judgment which I gave in July, 1945, is destroyed. That is because here, in proceedings between these parties, the appellants who had set up and were entitled to set up the estoppel were themselves alleging and proving this very point which they said Mrs. Remnant was estopped from asserting. I cannot help thinking that if Mrs. Remnant had, at the hearing before Vaisey J., sought to amend her summons or had sought to appeal out of time against my judgment, she could have obtained leave and could have reasserted, in the circumstances jointly with the executors, her claim to the Exhibit 4 furniture. The matter could have been put in order in other ways. She could, formally by her counsel, have abandoned her claim as donee. She could have assigned whatever rights she might have to the Friswell executors. Had she done that, the appellants would, as it seems to me, have been in a hopeless position in resisting their claim; but, as Mr. Ungoed-Thomas is perfectly entitled to say, those things did not happen and, as the matter now comes before the court, we have to treat the case as we find it stated on the summonses.

In my judgment, the answer to the claim is that in proceedings of this nature, where the court must do justice to the best of its ability on the facts as proved, the right answer is that arrived at by Vaisey J. either on the ground he stated or on the ground that the substance of the matter is now that Sir Charles Friswell's executors, on their own behalf or on behalf of Mrs. Remnant, have established as against the debenture holder and the receiver a title to have this property delivered to them or as they shall direct. That, I think, is supported by certain other considerations. The first is this, and it has involved an interesting argument upon the question of a bailment: In order to introduce that argument, I desire to refer to the statement which Mr. Ungoed-Thomas made in opening the case to this court of the matters of fact which he said should be treated as admitted and established and which he at least conceded. He put them in the form of questions and gave answers. These were his questions and these his answers: First, "Did this property, "originally belong to Mrs. Remnant and her husband? "(Answer): I accept it that it did." Second question: "Was it sold by Mr. and Mrs. Remnant to Sir Charles Friswell? "(Answer): I accept it that it was." Thirdly: "Was it "given by Sir Charles Friswell to Mrs. Remnant? (Answer): "I accept it that it was"; and, fourthly—and this may be the most important answer in some respects—"Did Mrs. "Remnant lend the furniture to the company, Savoy Estate "Ld., which had been established by Mr. Remnant? "(Answer): I accept it that she did." Mr. Pascoe Hayward has based his argument upon that last point most forcibly, for he said the company and the persons now deriving title from the company are admittedly now, and always were, bailees of this furniture. They have never attempted to establish any right or title of their own to the furniture. Mr. Pascoe Hayward has said that that being the position, they being bailees, they could only defeat the title of their bailor, who they say was Mrs. Remnant, by setting up some title paramount in a third party. That was exactly, says Mr. Pascoe Hayward, what they did in the Court of Appeal on the former occasion, and it was indeed the only way they could defeat Mrs. Remnant. They set up the jus tertii, and the tertius was Sir Charles Friswell. Having done that, says Mr. Pascoe Hayward, then it must follow that there was some kind of legal relationship established between Sir Charles Friswell and the appellants. It might be that they were to be treated as having attorned bailees of Sir Charles Friswell, and, having done that they could not thereafter turn round and dispute the title of Sir Charles Friswell as bailor by setting up again another jus tertii, the tertia in this case being Mrs. Remnant, whom they previously repudiated as bailor. For the proposition that the bailee, in order to resist the claim of the bailor, may only set up the right of a third party with the authority, actual or assumed, of the third party, Mr. Pascoe Hayward relied on the case of *Rogers, Sons & Co.* v. *Lambert* (1). I do not find it necessary to pursue that matter. For my part, I think there may be great difficulty in the attornment point. But I think Mr. Pascoe Hayward on this ground is in a stronger position when one considers the line taken before Vaisey J. and this court. For in resisting the claim of Sir Charles Friswell, who, on the evidence and on Mr. Ungoed-Thomas's admissions, was the purchaser of this property, they are setting up the title of Mrs. Remnant. I think there is force in Mr. Ungoed-Thomas's argument that they did not really set up Sir Charles Friswell's title on the previous occasion in the Court of Appeal. I am inclined to think the bailment point, which might have been available to Mrs. Remnant, was not then put, at any rate in the forefront of her case. But undoubtedly in this court, Mr. Ungoed-Thomas is setting up and is relying on the gift. That does seem to place him in somewhat of a difficulty. Either the title he seeks to set up is a good title, in which case he, a receiver, an officer of the court, is claiming to resist Mr. Pascoe Hayward by setting up the title of somebody else, in which case prima facie he, as an officer of the court, ought to hand it over to that somebody; or he is setting up—and this is really his case—a wholly fictitious title, because he is seeking to say in one and the same breath " I rely upon the gift to " Mrs. Remnant, but at the same time, by virtue of the res " judicata, I say it is a title which she could in no circumstances " whatever effectively enforce against me." I am not satisfied that the latter is a possible line of argument to take—certainly not if it be right that Mr. Ungoed-Thomas or the parties he represents are in the position of bailees quoad Sir Charles Friswell.

I have indicated the possibility that Mrs. Remnant might assign or abandon any claim which she might have to the Exhibit 4 furniture, and I will just refer to a sentence quoted by Lopes L.J. in the *Rogers* case (2) from a judgment of Blackburn J. in an earlier case of *Biddle* v. *Bond* (3).

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(1) [1891] 1 Q. B. 318.

(2) Ibid. 328.

(3) (1865) 6 B. & S. 225, 233.

Blackburn J., delivering the judgment of the Court of Queen's Bench, said: "We think that the true ground on which a "bailee may set up the jus tertii is that indicated in *Shelbury* "v. *Scotsford* (1), viz., that the estoppel ceases when the "bailment on which it is founded is determined by what is "equivalent to an eviction by title paramount. It is not "enough that the bailee has become aware of the title of a "third person. We agree with what is said in *Betteley* v. "*Reid* (2) that 'to allow a depositary of goods or money "'who has acknowledged the title of one person, to set up "'the title of another who makes no claim, or has abandoned "'all claim, would enable the depositary to keep for himself "'that to which he does not pretend to have any title in "'himself whatsoever'." As Somervell L.J. pointed out, if you added to those words "who makes no claim" or "who "can make no claim," it would cover the facts of this case as Mr. Ungoed-Thomas says they are between himself and Mrs. Remnant.

Of course, that does not decide the question: because, query, is it right to say, between Sir Charles Friswell on the one hand and the appellants on the other, that the latter were depositaries in the sense of being bailees of Sir Charles Friswell? I think, as I have said, that there are difficulties in that point. For my part, I prefer to leave it there and express no concluded opinion, because I come back now to the matter with which I started. We are, after all, dealing here with two parties, a debenture holder and a receiver. So far as the debenture holder is concerned, it seems to me that for the purposes of this case he rather drops out of the picture. The debenture holder has not got this furniture in his possession. If the debenture holder is going to claim the furniture, he must prove title, and on a conflict of title he has failed to prove any title whatever in himself. The strength of Mr. Ungoed-Thomas's claim is on behalf of the receiver who undubitably has got possession, and of course he can say, and he is bound in the exercise of his duty to say, "Any "claimant to this property in my possession must make good "the claim." As an officer of the court, the position is that the furniture is here in the possession of the court through its officer, the receiver. I am far from suggesting that there is any impropriety in the attitude that the receiver in this case has taken. I think, if I may say so, he has acted perfectly properly, in a very complicated and somewhat obscure matter, in resisting the claims that have been made and putting perfectly properly to the court the arguments that have been put and in putting the other parties to proof of their case; but he is an officer of the court and, whether the passage that I have cited from *Rogers, Sons & Co.* v. *Lambert* (1) quite covers the case, at least it presents an analogy, and we, I think, in deciding this matter, have got to consider what ought the officer of the court to do on the facts as they have emerged? If the receiver can establish a title to this furniture in Mrs. Remnant, is he properly entitled then to retain it if he succeeds against her and to rely upon this estoppel? For reasons that I have already stated, having regard to the way in which these matters have been tried, I do not think he can sever the thing to an extent which would enable him at one moment to set up this matter of fact himself and in the next, in the same proceeding, to deny the right of another party to the proceeding to rely upon the same fact. I think, therefore, that no sufficient answer was given to the question put by Jenkins L.J.: "If the appellants do succeed in setting "up the title of Mrs. Remnant, how can the receiver retain the property against her?" On the other hand, if they cannot rely upon it, either on the ground that it is not a title, within the language I have cited from Blackburn J., which they can properly set up against Sir Charles Friswell or because the estoppel works both ways in these proceedings—it is no more open to them than to Mrs. Remnant to set it up—then, as it seems to me, the present respondents have made good their case, as Vaisey J. thought, to have the furniture handed over to them or as they direct, which I understand quite clearly is to hand it to Mrs. Remnant.

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(1) (1602) Yelv. 22.

(2) 4 Q. B. 511.

There is one matter that I have left till last. I have said that the two summonses were tried concurrently really as one matter by Vaisey J. His order was to the effect that Mrs. Remnant's claim failed by reason, as I have already stated, of her failure to identify the furniture in question. He therefore dismissed her claim, save as regards certain matters of costs. I have not gone into that, because Mrs. Remnant does not appeal and it has been unnecessary to do so, but in the notice of appeal as before the court when the case was opened, Mrs. Remnant was a respondent to the appeal. The appellants were seeking to vary the learned

(1) [1891] 1 Q. B. 318.

judge's order as regards Mrs. Remnant as to costs, which was the only matter that they could complain of. As regards the rest of Vaisey J.'s order, which had directed the delivery to the respondents, now represented by Mr. Pascoe Hayward, they sought to have that reversed and that summons, the summons of July 16, 1945, dismissed; but, on opening the appeal, Mr. Ungoed-Thomas made it quite plain that he did not desire to proceed against Mrs. Remnant, that he had so informed her and the other parties, and he asked leave formally to amend the notice of appeal by striking out Mrs. Remnant as a respondent and striking out from the relief he sought any matter relating to Mrs. Remnant. Mr. Pascoe Hayward has not objected, and in fact Mrs. Remnant has not appeared in person or by counsel before us on the hearing of the appeal. But, strictly, the notice of appeal remains in its original form and we were asked for liberty to amend. I mention that, because I think it is desirable to have in mind that in a case of this sort the whole matter is before us and that it is not right to ignore the position of the various parties concerned, whether or not they are strictly before the court as parties to the appeal. I think, in the events which have happened, it would be better to allow the amendment and to have the record altered, because otherwise Mrs. Remnant would not have appeared though a party to the appeal; but it has, I think, been right that her name should be kept as a respondent during the hearing, because in the administration of the assets in the hands of the receiver she is a person whose claim has obviously to be considered. Had it not been that Mr. Pascoe Hayward has made it, as I have said, quite plain that he is really a champion of Mrs. Remnant, we might have taken perhaps a different view as to the propriety of allowing the amendment, but I think the amendment should be made in the form suggested, for the reasons I have stated.

I have covered, I hope, all the matters which have been put before us. I have said that the question is complicated and the facts obviously very peculiar. It seems to me unnecessary to express any view on some of the interesting points of law as to the extent of estoppels which might in other cases arise. On the facts of this case, it seems to me the view taken by Vaisey J. was right and that the direction he gave for delivery of this furniture to the executors of Sir Charles Friswell or as they shall direct should stand and the appeal should accordingly be dismissed.

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SAVOY ESTATE LD., *In re.*

REMNANT *v.* THE COMPANY.

SOMERVELL L.J. I agree that the appeal should be dismissed, for the reasons which have been given by the Master of the Rolls. The issues in this appeal fall to be determined in the light of the circumstances which have been referred to, namely, the fact that these two summonses came on and were heard together. In agreeing with what has been said and in regarding this appeal as being disposed of on that basis, I want to make clear that I do not myself rely solely on those circumstances. I am not satisfied that what I may call the line, the main argument, put forward by Mr. Ungoed-Thomas, would necessarily have succeeded if, for example, the same sort of problem had arisen in a second action at law. I will not trouble to detail the circumstances, which can easily be imagined, in which the same sort of problem might arise in a second action by a second claimant in respect of the goods which an original claimant in an earlier action had unsuccessfully claimed and against whom res judicata had been asserted. Whether the argument advanced on behalf of the appellants would succeed in that case or not, it is not necessary to consider, but I wanted to make it clear that I am not satisfied that it would. I agree with what the Master of the Rolls has said. I think there are some difficulties about Mr. Pascoe Hayward's submission about attornment. On the other hand, it might be that in such a case the principle that has been quoted from *Biddle* v. *Bond* (1) might by a comparatively minor extension be regarded as covering the issue.

JENKINS L.J. I also agree that this appeal fails. It is now admitted that the company never had any beneficial interest whatever in this furniture, which consequently was never subject to the charge constituted by the debentures. The position is that the furniture was in the possession of the company when the receiver was appointed and so passed into his possession, or, rather, perhaps one should say, his custody. Now it has become clear that the furniture is not and never was the company's property and is not and never was subject to the charge, the sole question is: Who is the owner to whom the furniture should be handed over? The only possible owner is Sir Charles Friswell, now represented by his executors, he having admittedly purchased the furniture from Mrs. Remnant, or else Mrs. Remnant under the gift which she says was made of the furniture to her by Sir Charles Friswell after he had purchased it. The receiver has succeeded in defeating Mrs. Remnant's claim, through her failure to adduce sufficient evidence to satisfy this court that the gift was ever made. The position therefore is, I should have said, that the receiver holding these goods as goods which were merely loaned to the company as bailee, and having eliminated one claimant, must hold for the only other possible claimants, namely, Sir Charles Friswell's executors.

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(1) 6 B. & S. 225.

The receiver, however, seeks to avoid that position by setting up against Sir Charles Friswell's executors the claim of Mrs. Remnant which he has already defeated. If that policy succeeded, the receiver would obtain in effect for his debenture holders an accession to their security to which they had no right at all, for no secret is made of the fact that, having repelled the executor's claim in that way, the receiver would still insist upon res judicata as between himself and Mrs. Remnant. I agree with my Lord that this position is wholly untenable. If the receiver relies on res judicata, as he is entitled to do, as barring Mrs. Remnant's claim against him, then, in my judgment, quite plainly that claim cannot be relied on as a defence against the executor's claim. The matter must be taken as res judicata for all purposes, and Mrs. Remnant's claim must be treated as dead for all purposes. If, on the other hand, the receiver is allowed to revive Mrs. Remnant's claim for the purpose of defeating the executors' claim, it must be resuscitated for all purposes, and the receiver, on successfully setting it up, must be taken, in my judgment, to have set it up for the benefit of Mrs. Remnant. Of these two possible views, the learned judge took the former one, and held that in the circumstances Mrs. Remnant's claim must be treated as wholly gone and that, her claim being out of the way, the only possible claimants were the executors, to whom he therefore directed the furniture to be handed over. In my judgment, that conclusion was a perfectly proper one to come to, in the peculiar circumstances of this case, and I agree that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Evans, Baker & Co. for Wood, McLellan & Williams, Chatham; George L. Barnett & Co.*

H. C. G.

C. A.

1949

July 12.

Evershed M.R., Somervell and Singleton L.JJ.

In re HARRY DUNN.

Ex parte THE OFFICIAL RECEIVER *v.* HARRY DUNN.

Bankruptcy—Debt to bookmaker—Specially indorsed writ—Apparent consideration for debt—Debtor's petition in bankruptcy to avoid claim—Receiving order and adjudication—Refusal of registrar of county court to rescind order and annul adjudication—"Abuse of "process of court"—Present or prospective liability of debtor—Bankruptcy Act, 1914 (4 & 5 Geo. 5, *c.* 59), *s.* 29.

Section 6 of the Bankruptcy Act, 1914, provides: "A debtor's "petition shall allege that the debtor is unable to pay his debts "and the presentation thereof shall be deemed an act of bankruptcy "without the previous filing by the debtor of any declaration of "inability to pay his debts, and the court shall thereupon make "a receiving order."

Section 29, sub-s. 1, provides: "Where in the opinion of the "court a debtor ought not to have been adjudged bankrupt ". . . . the court may . . . . by order annul the adjudication."

By a specially indorsed writ against a debtor a bookmaker claimed that the debt therein mentioned was enforceable by reason of the consideration shown. The indorsement stated inter alia that the debtor by letter to the bookmaker and in consideration of the bookmaker not proceeding against him agreed that the Bookmakers' Protection Association should adjudicate and that he would be bound by their decision, that the letter stated that it was agreed that he should not be posted as a defaulter, and that the Association's decision that the debtor pay to the bookmaker a specified sum was communicated to the debtor. To avoid the claim the debtor filed his petition in bankruptcy and after the adjudication—the debt in question being the only scheduled liability—the bookmaker intimated that he would not lodge a proof. The Inland Revenue authorities lodged a proof for income tax but withdrew it in view of the intention of the trustee (the official receiver) to apply to the county court registrar to annul the adjudication, rescind the receiving order and dismiss the petition. They would not, however, release their debt. When the application was made, the registrar dismissed it, declining to hold that the filing of the petition to avoid the claim was an abuse of the process of the court and founding himself also on the Inland Revenue authorities' refusal to release the debt. The Divisional Court in Bankruptcy dismissed the trustee's appeal from that decision. On that appeal the trustee, in a further affidavit, deposed that the bookmaker's solicitors had stated to him on the telephone that the bookmaker would not prove and that they recognized that the debt was unenforceable. The bookmakers however refused to release his debt. To the affidavit were exhibited the debtor's letter agreeing, in consideration of the bookmaker's not proceeding, to be bound by the Association's award and a letter from the bookmaker's solicitors stating that the debt must be paid, as the Association had decided in the bookmaker's favour. On appeal to the Court of Appeal:—

Held, dismissing the appeal, that it was not clear on the face of the writ that there was no case for the debtor to answer. In judging whether an order of adjudication ought to have been made, the court was entitled to have regard to the actual state of affairs at the date of adjudication, and which might appear from evidence subsequently filed, but the court was not entitled to take into account facts which had occurred after the date of the order. The fact that the debtor had filed his petition to protect himself from evils which he might otherwise suffer and not with the intention of securing a fair distribution of assets amongst his creditors was not an abuse of the process of the court and was not sufficient reason for the court to exercise its power under s. 29 to annul the adjudication.

In re Painter [1895] 1 Q. B. 85 followed.

APPEAL from the Divisional Court in Bankruptcy (1).

On August 31, 1948, a bookmaker issued against the debtor a specially indorsed writ. The indorsement, so far as material, was: "Statement of claim. The plaintiff's claim is for "1,610*l.* as being payable under an agreement made by the "defendant with him. Particulars. 1. As the result of "betting transactions between the plaintiff and the defendant "the defendant owed to the plaintiff the sum of 1,610*l.* 2. On "November 26, 1947, the defendant by letter addressed to "the plaintiff and in consideration of the plaintiff refraining "from taking any proceedings against him agreed that the "matter in dispute should be adjudicated upon by the Book-"makers' Protection Association and agreed to be bound "by their decision and it was part of the said agreement "that the defendant would not be posted as a defaulter. "3. The Northern Bookmakers' Protection Association, Ld., "adjudicated on the matter in dispute and found that the "defendant should pay to the plaintiff the sum of 1,610*l.* "and the decision was communicated to the defendant. "4. The defendant has failed to pay such sum or any part "thereof . . . ." On September 2 the writ was served on the debtor. To avoid the claim he filed his petition in bankruptcy and on September 13 the receiving order and the adjudication order were made. The debt of 1,610*l.* was the only liability scheduled and, on October 21, the bookmaker's solicitors wrote to the official receiver—the debtor's trustee in bankruptcy—that the bookmaker did not intend to prove. On November 9, the Inland Revenue lodged a

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(1) [1949] W. N. 253.

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proof for 33*l.* 16*s.* 10*d.* income tax. As the trustee's application to the registrar was going to be made, they withdrew their claim, but declined to release the debt. On March 26, 1949, the official receiver applied under s. 29, sub-s. 1, of the Bankruptcy Act, 1914, to have the adjudication annulled, the receiving order rescinded and the debtor's petition in bankruptcy dismissed. The registrar, dismissing the application, said that, having read *In re Painter* (1) he would not hold—as he had been invited to hold—that a debtor's filing his petition to avoid a doubtful claim was an abuse of the process of the court: and he gave as an additional ground for his decision the fact that the Inland Revenue's debt had not been released.

The official receiver appealed to the Divisional Court. On the appeal, there were put in by leave a further affidavit by the official receiver and certain exhibits. In the affidavit the official receiver deposed that the bookmaker's solicitors told him by telephone on October 21 that the bookmaker did not intend to prove and that they recognized that the debt was an unenforceable gaming debt. There were also exhibited the writ, the debtor's letter of November 26, 1947, and a letter written on October 14, 1948, to the official receiver by the bookmaker's solicitors, contending that there was a binding contract to pay the amount of the claim, as the Bookmakers' Protection Association had given a decision in the bookmaker's favour.

The Divisional Court (Romer and Jenkins JJ.) dismissed the appeal.

The Official Receiver appealed.

Aronson K.C. for the appellant. In this case the debtor ought never to have been adjudicated bankrupt as at the date of adjudication the only debt he owed was one of 1,610*l.* to a bookmaker which was unenforceable. Accordingly, the court should exercise the descretion conferred on it by s. 29 of the Bankruptcy Act, 1914, and annul the adjudication. This case is not covered by *In re Painter* (1). A betting debt is not a debt at all having regard to the provisions of the Gaming Act. This case is distinguishable from *Hyams* v. *Stuart King* (2). In that case there was an express promise to refrain from declaring the debtor to be a defaulter. Here the only consideration for the debtor's promise to pay was the agreement to go to arbitration. Clearly if there were no debt at all, it would be conceded that the order of adjudication should be set aside. If it is doubtful whether there is a debt or not, it is submitted that it is the duty of the court to decide that question, and, in deciding it, the court should have regard to the evidence which although obtained after the order was made, establishes that at that date there was in fact no enforceable debt. Much time and public money will be spent if the adjudication is not annulled for in this event the bankruptcy proceedure must go on. It is not sufficient to justify an order for adjudication that the debtor shows he may owe some doubtful debts. . . . .

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(1) [1895] 1 Q. B. 85.

(2) [1908] 2 K. B. 696.

Oliver Lodge for the respondent debtor. In this case there was clearly a moral debt. The bookmaker's writ was so framed as to bring the claim within *Hyams* v. *Stuart King* (1). The debtor cannot be expected to know whether that claim could have succeeded. He took the only course open to him in order to avoid judgment being entered against him in default of appearance or defence. The debtor had no assets so he was not in a position to defend the bookmaker's action. It is not open to the court in these proceedings to decide whether the bookmaker's claim is a good one, as all the parties before the court are concerned to say that it is bad. If the bankruptcy is annulled the bookmaker's action may proceed and his debt may be held to be good. It is submitted that s. 29 deals with the actual state of the debtor's affairs at the date of the order of adjudication. The position does not depend on the knowledge of the debtor at that date.

Aronson K.C. in reply. It is conceded that this case depends on the first limb of s. 29. The power thereby conferred in the court is discretionary. This court should interfere with the manner in which the court below exercised its discretion as it was exercised under a misapprehension. It is untrue to say that the debtor was unable to pay his debts, as his only debt was one for 1,610*l.* which was unenforceable in a court of law. The whole foundation of the order has therefore gone.

EVERSHED M.R. The present application, which is by way of appeal from the Divisional Court in Bankruptcy, is that the court should annul the bankruptcy pursuant to s. 29 of the Bankruptcy Act, 1914. Sub-section 1 of that section provides: "Where in the opinion of the court a "debtor ought not to have been adjudged bankrupt, or where

(1) [1908] 2 K. B. 696.

"it is proved to the satisfaction of the court that the debts "of the bankrupt are paid in full, the court may, on the "application of any person interested, by order annul "the adjudication." It is conceded by Mr. Aronson, who has argued the case before us on behalf of the Official Receiver, the trustee in bankruptcy, that this case must stand or fall under the first limb of the sub-section; in other words, this is a case in which, as he says, the debtor ought not to have been adjudged bankrupt. It is to be observed that the power of the court under s. 29 is discretionary, "the court may, "on the application . . . . by order annul the adjudication." The registrar declined to annul it, and the same view was taken by Romer J. and Jenkins J. (as he then was) sitting as a Divisional Court.

It needs no emphasis that this court would in any case be reluctant to interfere with the exercise of the discretion of two courts below; but it is claimed that the discretion was exercised by misapprehending the true inferences to be drawn in this case, and as a consequence incorrectly applying the principles which should be applied under s. 29. It is said that unless it can be shown that when the debtor presented the petition he truly alleged that he was unable to pay his debts, then the order should not have been made. I think the appellant must go so far as to say that the court in the circumstances of this case must annul the bankruptcy.

The first point which leaps to the eye is this: having regard to the circumstances in which the bookmaker, Mr. Pat Clarke, became an alleged creditor of the debtor, is it true to say that the debtor was unable to pay his debts since, as appears from the statement which he himself filed of his affairs, the only debt which he owed was this sum of 1,610*l.*? Mr. Aronson's point is that the 1,610*l.* was purely a gaming debt, and would have been quite unenforceable in any court of law. He has therefore invited us to say, since the only debt on the footing of which the order was made was a gaming debt, and, therefore, not a debt at all, the whole foundation for the exercise of the court's powers under s. 6 is removed, and no order for adjudication should have been made.

It has been necessary to consider what on the face of the writ issued by the bookmaker is the claim. If the matter stood as stated in para. 1 of the particulars alone, it would manifestly follow that there was here no legally enforceable debt at all; as a result of betting transactions the debtor owed 1,610*l*. But para. 2 introduces into the particulars the debtor's letter. That letter undoubtedly purported to create a new and valid consideration or a promise on the part of the debtor to pay what, if anything, the Bookmakers' Protection Association should decide that he, the debtor, owed to the bookmaker. No doubt, therefore, the view was entertained by the bookmaker and his advisers that as the result of that letter the case was taken out of the ambit of the Gaming Act and became an enforceable debt. That view was expressly stated by them in a letter addressed to the Official Receiver on October 14, 1948. They said: "We contend there is a "binding contract to pay the amount of this claim," and referred to a decision of the Divisional Court in 1912. Whether or not that contention is right seems to me to be a matter at any rate requiring some investigation. It is to be observed that one party to the alleged debt, namely, the creditor, the bookmaker, is not now before the court. If it was so clear on the face of the writ that we could say: "There "is manifestly no debt which is enforceable, this writ is really "a piece of waste paper," then it might be right for the court to say: "There never was a debt and the order which was "made on September 13, 1948, adjudicating the debtor a "bankrupt ought not to have been made because the statement "that he could not pay his debts has been shown to be "inaccurate." But that is going much further, as it seems to me, than we are now or the court below were entitled to go. However doubtful the success of the bookmaker's claim might be, it is, as I say, a matter requiring some argument. I think it is understandable that the debtor, on the issue of the writ, might well have been advised that the case might not be within the ambit of the Gaming Act. He might have been seriously perturbed as to what he ought to do—whether he was going to raise the Gaming Act and fight the action which was obviously going to be a matter causing expenses which were beyond the limits of his financial resources.

It seems to me, therefore, that the learned judges in the court below were right in saying that on the face of that writ they could not say that there was here, beyond all doubt, no debt at all. In a passage much relied on in Romer J.'s judgment, he said this: "As far as I can see, the matter "really depends on whether, at the date when the receiving "order was made and the adjudication was made, it can "truly be said that the debtor ought not to have been adjudged "bankrupt. It seems to me one has to examine the position

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"as it then appeared to be and ascertain and determine "whether that position"—which as a matter of English means the position as it then appeared to be—"was one "under which a receiving order and adjudication could "properly be made or could not properly be made. I do "not think one would be very materially assisted in that "inquiry by anything that has transpired since. At the time "when the debtor filed his petition and the order in bankruptcy was made, the debtor had received the writ—he "got that some weeks previously—the creditor showed "every intention of pressing his claim, and the debtor knew "that he could not pay. I am not clear that on the face "of this specially indorsed writ there was no case for the "debtor to answer." Then he goes on to give some reasons for that. He concludes this part of his judgment by saying: "All that I think it is necessary to decide in this case is "whether or not it was plain at the date when the debtor "filed the petition that he was under no present or prospective "liability to the plaintiffs in this case; and I am unable to "say that it is plain that he was not." I entirely agree with Romer J. (as did Jenkins J.) that here, to use his own words, it was "not clear that on the face of this specially indorsed "writ there was no case for the debtor to answer." I think if I may venture a criticism of the language used, it is not perhaps entirely correct to say that the matter ought to be adjudged in the light of the facts as they appeared to be at the date when the receiving order was made, namely September 13. I think Mr. Aronson is right in saying that in judging whether the order ought to have been made, the court is entitled to have regard to the actual state of affairs at that date, and that, of course, may appear from evidence subsequently filed, and certainly would not appear from the bare statement on the formal petition, which alone was before the court when the order was made.

But I do not think one is entitled (for the purposes of the first limb of the sub-section) to take into account in determining whether the order ought to have been made facts which have occurred after the date of the order. I say that because after the order had been made a communication was received from the solicitors to the bookmaker, to the effect that they did not propose to prove in the bankruptcy. They have even gone so far, according to the evidence, as to intimate that they appreciate it would not be a provable debt, though they have expressly declined to release the debtor from it. The fact that a creditor after adjudication may release the debt could not, I think, prima facie affect the question whether the order ought, in the first instance, properly to have been made. I will go a little further and say that I am not satisfied that it must be affirmatively shown that there was at the date of the bankruptcy debts which were enforceable and from which there was no escape. I think on the facts here shown, when the debtor was faced with the claim on the writ for 1,610*l.*, and when it is not shown—as I think it is not shown—that that writ could have been set aside as being mere waste paper, then the court is not entitled to say this order ought not to have been made. I venture to reinforce that by a very short reference to one of the cases cited, namely, *In re Painter* (1). It is unnecessary to refer to the facts of that case, but I think it clearly emerges from that case that the circumstance that the debtor has filed his petition in order to protect himself from evils which he might otherwise suffer, and not with any benevolent intention of benefiting his creditors by securing a fair distribution of assets among them, is no reason why an order should not be made. It is to be observed that should this order be annulled, any outstanding claim which existed at the date of the order and which had not been paid off or discharged in the meantime would remain alive. It seems to me nothing has occurred which would prevent the bookmaker then proceeding on his writ. Certainly the fact that this court (in his absence) took the view that his claim was unenforceable would not prevent him. The debtor might, if he defended the action, raise the appropriate defences and dispose of the claim; but he might have to fight, and fight perhaps at considerable cost to himself.

There is nothing, I think, in the policy of the Act which disentitles a debtor to say: "I will go bankrupt and protect "myself from these possibilities and get rid, whether or not "they be provable debts, of any claims which are made "against me." I think there is no ground for saying that that attitude amounts to an abuse of the process of the court, and no ground for saying that (without amounting to an abuse of the process of the court) it can be treated as sufficient reason for the court exercising its powers under s. 29 and annulling the order. For these reasons, which I have added to what was said in the court below, and with all respect to

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(1) [1895] 1 Q. B. 85.

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Mr. Aronson's forcible argument, I conclude that this appeal should fail.

SOMERVELL L.J. I agree.

DENNING L.J. Mr. Aronson urged strongly that here there was no debt which was enforceable in the courts, and that on that ground the adjudication should be annulled. He said it would be a misuse of bankruptcy proceedings if they were allowed to be used in cases where there was no enforceable debt. It is probably correct to say that here there was no enforceable debt. If the matter was fully investigated it would probably be found that the bookmaker's claim was not enforceable: for, assuming that *Hyams* v. *Stuart King* (1) is still good law, there was no fresh and real consideration such as would fall within it. But I do not think the enforceability of the debt is the test. Even if the debt was unenforceable, nevertheless if the debtor honestly believed on reasonable grounds "that he was unable to pay his debts" the adjudication was good and should not be annulled ab initio. Now the debtor was not versed in the nice distinctions that have been drawn about *Hyams* v. *Stuart King* (1), and I do not suppose his solicitor was. The bookmaker's solicitor relied on a case which gave considerable colour to the claim, and the proper inference from the evidence is that the debtor honestly believed on reasonable grounds that this debt was enforceable at law; and he knew he could not pay it. In that belief he quite properly filed his petition and was quite properly adjudged a bankrupt. In those circumstances it is not a case which falls within s. 29. It cannot be said that he ought not to have been adjudged bankrupt. It now turns out, indeed, that there are no debts, but that only means that the bankruptcy proceedings will have to be wound up. This will have the result that the debtor will get his discharge free from any possibility of a claim by the bookmaker. If the bankruptcy were annulled, it would mean that a claim could be still made against him. I agree the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor, Board of Trade; H. Soden-Bird & Sons, Newcastle-on-Tyne; Solicitor of Inland Revenue.*

B. A. B.

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(1) [1908] 2 K. B. 696.

THORPE *v.* FASEY.

WYNN-PARRY J.

1949

July 6, 7, 8.

Vendor and purchaser—Sale of building estate—Successive completion by parcels—Part performance—Purchaser unable to complete—Repudiation—Damages for breach of contract—Rescission.

In 1937 the plaintiff contracted to sell to the defendant an estate of about 160 acres for 38,000*l.* The contract included the following terms: (*a*) an immediate payment of 1,400*l.* as a deposit; (*b*) completion (followed by a conveyance) as to one parcel of about 40 acres on or before October 3, 1937, subject to a payment of 12,600*l.*; (*c*) similar completion as to three further parcels of about 40 acres each on or before October 3 in 1939, 1940 and 1941 respectively, subject to payment of 8,000*l.* in each case; (*d*) the purchaser might anticipate the due date for completion in respect of each parcel or a portion thereof on payment of the prescribed instalment or a proportion thereof; (*e*) if the purchaser should make default in the payment of any instalment or of any interest due, the whole of the unpaid instalments with the interest thereon should immediately become payable; (*f*) interest should be payable on such part of the purchase money as should remain owing after October 3, 1937; (*g*) (the purchaser's intention being to develop the land as a building estate) the purchaser should not develop the property otherwise than in accordance with plans previously approved by the vendor, such approval not to be unreasonably withheld.

The defendant paid the deposit of 1,400*l.* and the first instalment of 12,600*l.* and the first parcel was conveyed to him in October, 1937. He entered into possession, and carried out a certain amount of development, but difficulties were occasioned by the political situation and cheap local competition, and later by war conditions, military requisitioning, and the revocation of a development permit under which he was acting, and by 1948 he was still unable to develop further or to complete in respect of the remaining parcels. Correspondence took place between 1945 and 1947, in which the plaintiff, while urging the defendant to complete, never gave notice making time of the essence; and the defendant, while stating his present inability to complete, consistently expressed his desire to do so when conditions should render possible the resumption of his building activities. Upon action being brought in 1947 by the plaintiff claiming (i) damages at law for breach of contract by reason of the defendant's failure to complete, and (ii) in the alternative, rescission of the contract:

Held, as to (i), that there is no distinction between the nature of a repudiation which is required to constitute an anticipatory breach of contract, and that which is required where the breach occurs after the time for performance has arisen; that, on the facts, the plaintiff had never made time of the essence and the defendant had never repudiated the contract; that, consequently, there had been no breach and that the claim for damages failed.

Mersey Steel & Iron Co. Ld. v. *Naylor, Benzon & Co.* (1884)

9 App. Cas. 434; *Cornwall* v. *Henson* [1900] 2 Ch. 298; and *Harold Wood Brick Co. Ld.* v. *Ferris* [1935] 2 K. B. 198, considered and applied.

As to (ii) that the claim for rescission also failed inasmuch as (*a*) the cases indicated that there was a well established principle that if a contract is to be rescinded it must be rescinded in toto, the parties being put in statu quo; observations of Lord Ellenborough C.J. in *Hunt* v. *Silk* (1804) 5 East 449, and of Lush J. in *Sheffield Nickel and Silver Plating Co. Ld.* v. *Unwin* (1877) 2 Q. B. D. 214, applied; *Mussen* v. *Van Diemen's Land Co.* [1938] Ch. 253, considered; and (*b*) the contract, on its true construction, was a single contract for the purchase of the whole of the land, and not a series of separate contracts for the purchase of the land by instalments, and that so construed it had been partly performed.

WITNESS ACTION.

On August 3, 1937, a contract was made between the plaintiff, acting on behalf of a syndicate, and the defendant, who was a builder, for the sale by the plaintiff to the defendant of an estate of about 160 acres near Sevenoaks known as Montreal Park, for development as a building estate. The contract provided by cl. 1 that "the vendor shall "sell and the purchaser shall purchase at the price of "38,000*l.* whereof the sum of 1,400*l.* shall be paid to "the vendor on the signing hereof as a deposit and the "balance shall be paid at the times and in the manner here-"after provided." The property was divided on an annexed plan into four differently coloured plots of approximately 40 acres each. Completion was to be as follows: As regards the pink land on or before October 3, 1937, on payment of 12,600*l.* "as further part of the purchase money"; (by cl. 2) as regards the green land on or before October 3, 1939, on payment of 8,000*l.* "as further part of the said purchase "money" and similarly as regards the remaining two parcels on or before October 3 in 1940 and 1941 respectively, subject to payments of 8,000*l.* in each case. On each payment of the money at the time appointed it was provided that the vendor would execute a conveyance of the parcel concerned and give the purchaser vacant possession. There was a provision that the purchaser might, on payment of the requisite sum, complete before the specified date in respect of each parcel, and might also complete before the specified date in respect of a portion of each parcel on paying an apportionment of the purchase money. There was a proviso that "if the purchaser shall "make default in payment of any of the said instalments of the "purchase price or in the payment of any interest payable "hereunder for 21 days after the same shall have become due "the whole of the purchase price with the interest thereon "shall become immediately due and payable." Clause 4 provided that the purchaser should pay interest on such part of the purchase money as should for the time being remain owing after October 3, 1937. Clause 7 provided that the purchaser should not develop the property otherwise than in accordance with plans previously approved by the vendor, such approval not to be unreasonably or arbitrarily withheld.

The defendant duly paid the deposit of 1,400*l*. and the first instalment of 12,600*l*., and the pink land was conveyed to him on October 27, 1937. He proceeded to develop the land, and an interim development permit was granted by the rural district council. Difficulties soon arose owing to cheap building competition in the neighbourhood and to the worsening international situation, and after the outbreak of war the defendant was unable to pay the second instalment of 8,000*l*. in respect of the green land due on October 3, 1939. Thereafter, owing to the war situation, military requisitioning and the restrictions on building, the defendant was unable to carry out any further development or to make any further payment. Moreover, in May, 1946, the rural district council notified the defendant that they were applying to the Minister of Town and Country Planning for consent to the making of an order revoking the interim development permit previously granted. Throughout all this period the plaintiff, who was a surveyor, recognized the difficulties of the defendant and assisted him in various ways, particularly in connexion with the lodging of an objection to the proposed application by the council, which resulted in the holding of a public inquiry on October 28, 1946. From 1945 onwards correspondence took place between the plaintiff's solicitors and the defendant's solicitors, in which the former, while urging that the defendant should implement his contract neither threatened him seriously nor served notice making time of the essence, while the latter maintained that the defendant was anxious to complete, but was unable to do so for the reasons known to both parties. The closing stages of the correspondence, leading up to the issue of the writ, were summarized and construed by Wynn-Parry J. in the following terms:—

On February 26, 1947, the plaintiff's solicitors wrote to the defendant's solicitors saying: "If we may say so, your letter "still gives us the impression that your client is relying upon "some favourable arrangement in respect of town planning "and that if such an arrangement can be secured he is prepared "to complete his contract for purchase, but if not then he "will not complete." That, I think is not an accurate reading of the correspondence written on behalf of the defendant whose attitude had been throughout, on the correspondence; "I should like to complete but I have not got the money, "at any rate, for the time being, and I do not see how I can "put forward a constructive proposal for meeting the position "created by my inability to complete till I know how I stand, "having regard to the decision of the Ministry." The plaintiff's solicitors go on: "We are to point out that our "client does not accept this position. He is not concerned "with any difficulties Mr. Fasey may be experiencing with "questions of town planning except indirectly and so far as "they affect our client in his contemplation of the probability "of certain eventualities. He, however, has a binding contract with Mr. Fasey which he insists shall now be completed "without further delay and without any reference to questions "of town planning, and we shall be very much obliged if you "will please let us hear from you in the immediate future "stating unequivocally whether your client is prepared to "complete his contract forthwith or, if not, what proposals "he has to make for our client's consideration. Our client "is not prepared to be put off any longer and unless we hear "from you satisfactorily in the immediate future we shall "be compelled to advise our client as to his remedies against "yours." That letter wants a little further consideration. If the sentence which I have read, beginning, "He, however, "has a binding contract with Mr. Fasey" had stopped at the words, "whether your client is prepared to complete his "contract forthwith," that might well have been construed as the bringing of unequivocal pressure upon the defendant to complete or take the consequences. I do not propose to express any view as to how far that would have carried the plaintiff, because I think it becomes unnecessary in view of the rest of the sentence which is, "or, if not, what proposals he "has to make for our client's consideration." The result of that is that the plaintiff was giving to the defendant a chance of either completing the contract forthwith, which would be the most satisfactory course from the plaintiff's point of view, or falling short of that, bringing forward proposals which the plaintiff might have been prepared to accept as a second best. Reading the letter as I do, therefore, I regard the last sentence as a threat to the effect that the plaintiff's solicitors would advise him to exercise his remedies against the defendant unless the defendant either completes the contract or produces proposals which the plaintiff is prepared to regard as satisfactory, though falling short of completion.

To that letter the defendant's solicitors replied on February 27, 1947, as follows: "The whole point of what "we have been endeavouring to put forward is contained "in the last few words of your second paragraph in which you "ask what proposal Mr. Fasey has to put to Captain Thorpe. "Obviously the proposals must depend on his future. We "have, however, been in communication with him on the "telephone—he is quite prepared to have a meeting if any-"thing can be gained by it, but you are aware of the present "position of builders having their capital locked up and "unrealizable, and we should not wish to waste any time by "putting forward proposals which Mr. Fasey could not carry "out. However, if you think any advantage could be gained "by an immediate meeting we shall be prepared to bring "Mr. Fasey up any day next week." Then they state a day and time. It is clear from that letter that the defendant's advisers are again emphasizing what seems to me to be the common sense of the matter, that the nature of any proposal which he could put forward must depend on the decision of the Minister, though they are careful to say if, notwithstanding that disadvantage to an immediate meeting, the plaintiff desires an immediate meeting, the defendant and his advisers will certainly agree to attend one. On March 13, 1947, the plaintiff's solicitors wrote: "With further reference "to your letter of 27th ultimo,"—that is the one I have just read—"we regret we have been unable to communicate with "you before this, but our client has been absent from London "on business. He has now returned and instructs us to inform "you that on further consideration he does not think there "is any necessity for him to be present at the suggested "interview. Perhaps, therefore, you would be so good as "to let us know when it would be convenient for you to call "upon us with your client, so that your client can put his "position frankly before us, and let us know what proposals "he has to make for the purpose of effecting an early com-

"pletion of his purchase of the remainder of the property "comprised in the contract." The defendant's solicitors replied on March 14, saying: "We wrote a few days ago to "the Ministry of Town and Country Planning pressing to "know when a decision will be reached on the hearing of the "the recent inquiry, but have not yet had a reply from them "As soon as we do so we will arrange with Mr. Fasey to come "up and will call with him at your office."

That appears to be the last letter passing between the parties or their solicitors until on July 1, 1947, the plaintiff's solicitors wrote to the defendant's solicitors: "On the instructions of our client we have instituted proceedings against "your client claiming inter alia specific performance of an "agreement dated August 5, 1937." I would add that it was not until February, 1948, that following the somewhat belated decision of the Ministry, authorizing the revocation of this order, a letter was written to the plaintiff, as the defendant's agent in the matter, communicating the fact that the council, pursuant to the decision of the Minister, had revoked the interim development order, the order of revocation being dated January 15, 1948.

In the action the plaintiff claimed (i) specific performance of the agreement; this claim was abandoned by the plaintiff's counsel in opening, and was not argued, in view of the defendant's manifest inability to complete; (ii) alternatively, damages for breach of contract; (iii) in the further alternative, rescission.

J. Neville Gray K.C. and *W. T. Elverston* for the plaintiff. Although the plaintiff is not pursuing his claim for specific performance, he is entitled to damages. A plaintiff cannot get both rescission and damages, but these remedies are being claimed in the alternative, see *Dominion Coal Co., Ld.* v. *Dominion Iron & Steel Co., Ld.* (1), where a plaintiff who was not entitled to specific performance was held entitled to damages; a fortiori in this case, where the plaintiff is entitled to specific performance, he is entitled to damages. Where there is an action for specific performance, a notice making time of the essence is never required, see *Farrant* v. *Olver* (2) followed in *Glover* v. *Broome* (3).

As to rescission, the first part of the contract has merged in the conveyance and no longer exists, and rescission may be had of the remainder. Such a remedy is perfectly fair and equitable as between the parties, unless a strong reason to the contrary is made out, see *Mussen* v. *Van Diemen's Land Co.* (1), and *Stickney* v. *Keeble* (2).

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(1) [1909] A. C. 293.

(2) (1922) 127 L. T. 145.

(3) [1926] W. N. 46.

Raymond Jennings K.C. and *M. G. Hewins* for the defendant. To support a claim for damages, a plaintiff must prove a clear and unqualified refusal to perform the contract, amounting to a repudiation, see *Mersey Steel & Iron Co., Ld.* v. *Naylor, Benzon & Co.* (3). The whole conduct of the parties must be considered in order to see whether there has been a complete renunciation.

[WYNN-PARRY J. The plaintiff's case is that the reiteration of "I cannot" is equivalent to "I won't."]

That might be so under certain circumstances, but the history here shows no wish or intention on the part of the defendant to renounce. As to notice to complete, see Fry on Specific Performance, 6th ed., p. 511. In no case has mere delay been treated as sufficient repudiation without some kind of notice. Here the defendant has not been guilty of such delay as to entitle the plaintiff to serve a notice, unless it specified a reasonably long time (*Cornwall* v. *Henson* (4) and *Stickney* v. *Keeble* (2) were referred to). The contract shows that both parties intended that the purchase of subsequent parcels should be financed by the profits of development of the preceding ones. The true inference from the correspondence is that the defendant was anxious to proceed, but that his plans depended on the decision of the Ministry, while the plaintiff, though pressing the matter, was willing to have a meeting to see what could be done. Then the writ was suddenly issued without warning.

As to rescission, this cannot be granted when the contract is partly performed, and cannot be rescinded as a whole. Here the defendant has taken up a quarter of the land and has paid a disproportionate instalment of the purchase price; the plaintiff has approbated part of the contract and cannot reprobate the rest. The general proposition that a contract partly performed cannot be rescinded is to be derived from *Sheffield Nickel & Silver Plating Co., Ld.* v. *Unwin* (5), *Hunt* v. *Silk* (6), and Williams on Vendor and Purchaser,

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(1) [1938] Ch. 253.
(2) [1915] A. C. 386.
(3) (1884) 9 App. Cas. 434.
(4) [1900] 2 Ch. 298.
(5) (1877) 2 Q. B. D. 214.
(6) (1804) 5 East 449.

4th ed., vol. II, pp. 1006 and 1009. There can be no difference in this respect between a contract which is voidable (e.g. for innocent misrepresentation) and one which is not so. On its true construction, the contract of August, 1937, is one and indivisible, and is not a series of independent contracts.

Gray K.C. in reply. To obtain damages for breach of contract, a plaintiff need not prove repudiation; he is entitled to damages at law for a breach, unless there is some answer in equity. The defendant admittedly has no equity to resist specific performance; what equity can he have to resist damages?

[WYNN-PARRY J. Are you now affirming the contract, or treating it as at an end?]

I have affirmed it up till now, but when the defendant in his evidence says that he cannot perform it, I am entitled to turn round and accept as from now the position that the contract is at an end, and to claim damages for the breach of it.

[*Jennings K.C.* Even at law failure to perform by a named date does not give right to damages, see Law of Property Act, 1925, s. 41, and Halsbury's Laws of England (Hailsham ed.), vol. VII, pp. 191-2. Only when time has been made of the essence can an action for damages arise; here no evidence to found an inquiry as to damages has been given.] See Williams on Vendor and Purchaser, 4th ed. at p. 994; also s. 41 is a re-enactment of s. 25, sub-s. 7 of the Judicature Act, 1873, which was enacted before the decision of the House of Lords in *Stickney* v. *Keeble* (1). The plaintiff's claim must prevail in equity, see *Lock* v. *Ball* (2). The plaintiff was entitled to regard the contract as repudiated by February, 1947, at the latest; or, if that is not sufficient, the issue of the writ must be taken as notice either to complete or to take the consequences.

It is too wide a statement to say that there cannot be rescission after part performance. The statements in Williams on Vendor and Purchaser at p. 994 are too wide if construed to refer to other than anticipatory breaches, and here there has not been an anticipatory breach; the authorities cited in that passage all refer to anticipatory breaches. Similarly the statements at p. 996 are too wide as regards repudiation. What constitutes a sufficient repudiation is shown by *Harold Wood Brick Co., Ld.* v. *Ferris* (3) where it was held a sufficient

(1) [1915] A. C. 386.

(2) [1931] 1 Ch. 35.

(3) [1935] 2 K. B. 198.

repudiation where one party showed by his conduct that he was unable and unwilling to complete; see also *Barber* v. *Wolfe* (1). There is no direct authority for the rescission of a contract after part performance, but here the parties have divided the contract into four stages; one stage has been completed and has merged in the conveyance; there remains the contract of sale of the remainder of the land, and the plaintiff can rescind as to that; *Sheffield Nickel & Silver Plating Co., Ld.* v. *Unwin* (2) is therefore distinguishable on the facts.

WYNN-PARRY J., having stated the facts, continued: The action is curious in this respect, that at the trial, Mr. Gray, on behalf of the plaintiff, stated at an early stage that he did not propose to pursue the claim for a decree of specific performance for the reason that, as I think appears clearly on the correspondence, and was affirmed clearly by the defendant's evidence, any such decree would not bear fruit. On the other hand, Mr. Jennings, on behalf of the defendant, admitted that he was not in a position to resist a decree for specific performance and, were the plaintiff to press for it, he would have nothing to say in opposition. However, that remedy is not pressed for, and I need not say anything more about it.

The plaintiff has pressed as his main claim his claim for damages at law on the ground that the defendant has broken the contract. It is not, of course, every breach of a contract that will give rise to damages and as regards the damages which are asked for under this head, the only breach that will support such a claim is a breach which amounts to a repudiation by the defendant of the contract, the repudiation being accepted by the plaintiff. For that purpose I think it is essential to show that an essential term of the contract has been broken. The term in question is the failure to complete. In equity that is a failure which is not necessarily fatal to the contract, and equity takes the view that failure to perform the contract on the day fixed is not a failure going to the root of the contract unless the parties have made time of the essence of the contract. At common law, of course the position is somewhat different. In Williams on Vendor and Purchaser, 4th ed. at p. 994, it is said: "A breach of contract "may be committed, not only by the failure to perform some

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(1) [1945] Ch. 187.

(2) 2 Q. B. D. 214.

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"obligation under the contract at the time when it ought to "be fulfilled, but also by the renunciation of performance "of the contract; and this may occur in two ways. If either "party absolutely refuses, or if by his own act he makes it "impossible for him to carry out his part of the agreement, "the other is entitled at his election either to treat such "renunciation of performance as a breach of contract, and "at once to rescind and sue on the contract accordingly, or "else to treat the agreement as still subsisting, wait till the "time is gone by for the renouncing party to perform the "acts promised, and then sue him for the breach occasioned "by such non-performance." I think it is clear from the language used in that passage that the first alternative, "either "to treat such renunciation of performance as a breach of "contract, and at once to rescind and sue on the contract "accordingly," has reference to an anticipatory breach. It was sought to draw a distinction between the nature of the repudiation which is necessary to amount to an anticipatory breach, and the nature of the repudiation which it would be sufficient to show in the case of a breach arising after the time for performance has arrived.

As regards anticipatory breach, it will be sufficient, if I refer to *Mersey Steel & Iron Co., Ld.* v. *Naylor, Benzon & Co.* (1), a case of anticipatory breach. Lord Selborne L.C. said: "Upon the other point, I do not think it desirable to lay down "larger rules than the case may require, or than former "authorities may have laid down for my guidance, or to go "into possible cases differing from the one with which we have "to deal. I am content to take the rule as stated by Lord "Coleridge in *Freeth* v. *Burr* (2), which is in substance, as "I understand it, that you must look at the actual circum-"stances of the case in order to see whether the one party "to the contract is relieved from its future performance by the "conduct of the other; you must examine what that conduct "is, so as to see whether it amounts to a renunciation, to an "absolute refusal to perform the contract, such as would "amount to a rescission if he had the power to rescind, and "whether the other party may accept it as a reason for not "performing his part; and I think that nothing more is "necessary in the present case than to look at the conduct "of the parties, and see whether anything of that kind has "taken place here."

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(1) 9 App. Cas. 434, 438.

(2) (1874) L. R. 9 C. P. 208.

I now turn to *Cornwall* v. *Henson* (1), which was not a case of anticipatory breach. That was a case in which "the "defendant in August, 1892, agreed to sell some land to the "plaintiff for 150*l.* of which 40*l.* was paid at the time, and the "balance was to be paid by twelve equal quarterly instal-"ments of 9*l.* 3*s.* 4*d.* each. In case of default for thirty "days in the payment of any instalment, the whole of the "unpaid instalments were to become immediately due and "payable and, in the event of default for thirty days in pay-"ment, the vendor was to be at liberty to resell the land, and "to retain out of the proceeds of sale the unpaid instalments "with interest, and was to pay the balance to the purchaser. "The purchaser went into possession under the contract, "and retained possession for a considerable time and, though "generally in arrear with the instalments, he had by August, "1895, paid them all, except the last. The last instalment "became due on September 29, 1895, but it was never paid. "Correspondence took place, in which the vendor called on the "purchaser to pay, but he never gave him notice that, if "payment was not made within a specified time, he should "treat the contract as abandoned. In October, 1896, the "purchaser went away, and the vendor was unable to find "him. The vendor resumed possession of the land and "endeavoured to sell it, but without success, and in March, "1898, he agreed to let it for three years to a tenant, who "took possession. In June, 1898, the purchaser reappeared, "and wrote to the vendor that he was prepared to pay the "final instalment. In July, 1898, the purchaser commenced "an action against the vendor, claiming specific performance "of the agreement of August, 1892, and damages in lieu of "or in addition to specific performance: *Held*, that the "plaintiff's conduct did not amount to a repudiation of his "contract, and that the vendor was not justified in treating "the contract as abandoned, and that though the purchaser "was not entitled to specific performance of his contract, he "was entitled to damages, which the court assessed at 125*l.*" There was an argument on a particular clause of the contract, and having referred to that, the Master of the Rolls said: "It is not, I think, necessary to decide whether that contention "is well founded, for in the view which I take of the facts "the vendor was not justified in treating the purchaser as "having abandoned his contract. I think it is plain that the

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(1) [1900] 2 Ch. 298.

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"vendor never brought to the mind of the purchaser, so long "as they were in communication with each other, that if he "did not pay the last instalment the vendor would treat the "contract as abandoned." Having reviewed the evidence, the learned Master of the Rolls continued: "I cannot find "any intention on the part of the plaintiff to abandon the "contract, or that any sufficient notice was given to him "by the vendor that, if the last instalment was not paid "within a specified time, the contract must be considered "as at an end."

Finally, on this aspect of the matter, I must refer to *Harold Wood Brick Co., Ld.* v. *Ferris* (1). That case did not involve any consideration of an anticipatory breach. It was a case in which the parties had made time of the essence of the contract. It concerned an agreement to purchase certain freehold land and buildings together with the machinery, plant and utensils thereon, and cl. 15, which was the material clause, provided for completion on August 31, 1933, with an option to the defendant to complete earlier at a less price, and it proceeded, "if for any reason the actual completion "of the purchase is delayed beyond August 31, 1933, then "nevertheless on that date the purchase money shall be "placed on deposit but the purchase shall in any event actually "be completed not later than September 15, 1933." The court treated that clause as making completion of the purchase on September 15, 1933, of the essence of the contract. The interest of the case, as far as the present case is concerned, lies in the observations of Greer L.J., on p. 205. The court affirmed the judgment of Swift J., and Greer L.J. said: "For "these reasons Swift J. was right in the conclusion he arrived "at, and it is not necessary to enter into the question whether "if time had not been of the essence of the contract the conduct "of the purchaser when pressed to keep himself up to date "would have been sufficient to indicate that he would not be "able to perform his contract. If one party indicates by his "conduct that he is unable or unwilling, whatever time is "given, to perform his contract, that is sufficient to justify "an acceptance of the repudiation and to entitle the other "party to damages, and I base my judgment on the fact that "a term which was of the essence of the contract has been "broken by the appellant and therefore he is liable for the "damages given against him." Roche L.J. said: "I agree

(1) [1935] 2 K. B. 198.

" that the purchaser, the defendant, had by November 13 " failed to complete the purchase and had made it plain that " he was unable or unwilling to do so then or at all."

In my judgment, when one considers these cases there is neither any good reason for a distinction nor, in my view, does there exist any distinction between the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen. What then is the result of that view upon the present case? It is true that in the present case the plaintiff did not, as he could have done, make time of the essence of the contract. That is not fatal to his case, if he can demonstrate that the evidence discloses that the defendant is unable or unwilling, whatever time is given, to perform his contract, or adopting the words of Roche L.J., that he is unable or unwilling to do so at all. Therefore the question comes down to the somewhat fine question as to what is the true view of the relevant letters in the correspondence, read in the light of those authorities.

I do not propose to read again the relevant letters. It will be sufficient, once again, to refer to the two letters before the letter intimating the issue of the writ, considered against the background which then existed. There had, of course, before that time, been a certain amount of pressure brought by the plaintiff on the defendant to complete, but, as I have pointed out before, on each occasion there was the alternative presented to the defendant, either to complete or to put forward other proposals which, short of completion, " we shall treat as satisfactory and which if accepted will " amount in effect to a variation of the contract." Then come these two letters, that of March 13, 1947, where the plaintiff's solicitors still ask that there should be a meeting for the purpose of discussing proposals, and the reply stating the willingness of the defendant and his advisers to arrange a meeting, but desiring to defer that meeting, for the reasons I have already given, until the decision of the Minister of Town and Country Planning should be known.

In those circumstances, it appears to me that the words of the Master of the Rolls in *Cornwall* v. *Henson* (1) apply and, in my view, it is not possible, on a fair reading of this correspondence to find " any intention on the part of the defendant " to abandon the contract or that any sufficient notice " before action brought "was given to him by the vendor that if" the outstanding purchase money "was not paid within a "specified time the contract must be considered at an end" and, therefore, I find that there was not a repudiation of the contract by the defendant and, therefore, no repudiation which could be and was accepted by the plaintiff. In my judgment, therefore, the claim of the plaintiff for damages at common law fails.

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(1) [1900] 2 Ch. 298, 302.

I must now consider the question of the alternative claim for rescission. On this aspect of the matter there is surprisingly little authority. I was referred to *Hunt* v. *Silk* (1), the sidenote to which is: "A. agreed, in consideration of "10*l.* to let a house to B., which A. was to repair and execute "a lease of within ten days, but B. was to have immediate "possession, and in consideration of the aforesaid was to "execute a counterpart and pay the rent. B. took possession "and paid the 10*l.* immediately, but A. neglected to execute "the lease and make the repairs beyond the period of the "ten days, notwithstanding which B. still continued in "possession: *Held,* that B. could not, by quitting the house "for the default of A. rescind the contract and recover back "the 10*l.* in an action for money had and received, but could "only declare for a breach of the special contract; for a "contract cannot be rescinded by one party for the default "of the other, unless both can be put in statu quo as before "the contract; and here B. had had an immediate possession "of the premises under the agreement." The case was tried before Lord Ellenborough C.J., who "thought that the "plaintiff was too late to rescind the contract, and that his "only remedy was on the special agreement, and therefore "directed a non-suit." The case came before the court on an application for a new trial. Lord Ellenborough, who presided, said in the course of his judgment: "Where a contract is to "be rescinded at all, it must be rescinded in toto, and the "parties put in statu quo. But here was an intermediate "occupation, a part execution of the agreement, which was "incapable of being rescinded. If the plaintiff might occupy "the premises two days beyond the time when the repairs "were to have been done and the lease executed, and yet "rescind the contract, why might he not rescind it after "a twelvemonth on the same account. This objection cannot "be gotten rid of; the parties cannot be put in statu quo."

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(1) 5 East 449.

As I read that judgment, there is the statement of what Lord Ellenborough regarded as a well-established general principle that where a contract is to be rescinded at all it must be rescinded in toto, and the parties put in statu quo, and he then follows that general statement with its application to the facts of the particular case, ending with a reiteration of the essential elements that must exist as a condition precedent for the granting of the relief of rescission, namely, that the parties should be capable of being put in statu quo.

The next case to which I was referred was *Sheffield Nickel & Silver Plating Co., Ld.* v. *Unwin* (1). That concerned, inter alia, the sale by the defendant to the plaintiff company of a certain business and certain patents. I need not go into the facts in detail, but the defendant was to receive for the business and the patents certain fully-paid shares and some money payments. He was to guarantee the shareholders a minimum dividend and he paid them the necessary money to make up the minimum dividend at the end of the first year. Then there was a resolution passed by the directors and carried at a general meeting whereby the defendant was released from the guarantee upon surrendering his shares and giving up to the company his rights to the patents. He "retired "from his office as director, giving up his shares and right to "the patents, and the company proceeded to sell one of the "businesses and one of the patents. The company afterwards "claimed to set aside the resolution and enforce the guarantee, "on the ground that the defendant had fraudulently mis-"described the property sold by him." The Divisional Court, consisting of Mellor J. and Lush J., having held that the resolution was not in excess of the powers of the company and was binding on it, proceeded to say also that assuming that the resolution had been passed in consequence of fraudulent misrepresentation on the part of the defendant, his position had been so far changed that it was too late for the company to repudiate the contract. As regards that part of the matter, Lush J., who delivered the judgment of the court, said: (2) "A contract voidable for fraud cannot be avoided when "the other party cannot be restored to his status quo: *Clarke* "v. *Dickson* (3). For a contract cannot be rescinded in part "and stand good for the residue. If it cannot be rescinded in "toto, it cannot be rescinded at all; but the party complaining

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(1) 2 Q. B. D. 214.

(2) Ibid. 223.

(3) (1858) E. B. & E. 148.

" of the non-performance, or the fraud, must resort to an action for damages." There, again, the language used indicates that the court there intended to pray in aid a well-established general principle that a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded in toto it cannot be rescinded at all; and one reason for not directing rescission is that the parties, or one of them, cannot be restored to their status quo.

I was also referred to *Mussen* v. *Van Diemen's Land Co.* (1), That case, as I understand it, is not one which may be said in any degree to whittle down the generality of the principle which was stated and relied on in the two cases to which I have referred because of the special terms of the bargain made between the parties and, indeed, the learned judge did not have to deal with this aspect of the matter at all but was concerned with the question whether the retention by the defendant in that case of a sum specified in the contract was or was not in the nature of a penalty; and, therefore, in my view that case does not affect the present case at all.

It is surprising, but that would appear to be the sum total of the diligent researches of the four counsel who have been engaged in this case, and I must proceed on the basis of those authorities. There is a passage in Williams on Vendor and Purchaser, in the 4th ed., vol. II, p. 1006, to which I was referred and which clearly proceeds upon the basis of the existence of the general principle which, in my view, emerges from the two cases before me. I must, therefore, applying that principle, refuse rescission in this case unless I can come to the conclusion that the true way of viewing the position is that the contract which must be the subject of rescission is the residue of the agreement of August 3, 1947, remaining after that part of it which concerns the first parcel had been superseded for all purposes by the conveyance of October 27, 1937. It was argued that, looked at properly, this agreement was an agreement for the sale of four plots of land and amounted to this, that the first lot was to be sold for 12,600*l.* (I will leave out of account the deposit) and the remaining three parcels for 8,000*l.* each, there being a separate completion date as regards each parcel of land. Against that construction there is this, that the first clause opens with the words, " The " vendor shall sell and the purchaser shall purchase at the " price of 38,000*l.* whereof the sum of 1,400*l.* shall be paid

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(1) [1938] Ch. 253.

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"to the vendor on the signing hereof as a deposit and the "balance shall be paid at the times and in the manner herein-"after provided." Those are the words which indicate, prima facie at any rate, that what is being dealt with is a single sale for a single purchase price, the subject matter of the sale being dealt with in parcels and the purchase price being payable by instalments as each parcel is conveyed. Some colour appears to me to be lent to that by the provision in cl. 2 that the purchaser may before the specified date complete his purchase of any part of any part—any part of any of the outstanding areas—in which case there is provision for an apportionment of this purchase money. Further, there is the proviso at the end of that clause which says, "provided further that if the purchaser "shall make default in payment of any of the said instalments "of the purchase price or in the payment of any interest "payable hereunder for twenty-one days after the same shall "have become due the whole of the unpaid instalments of "the purchase price with the interest thereon shall become "immediately due and payable," which indicates that what the contract is dealing with is a single transaction with a single purchase price, split in the manner provided in cl. 2. Again, in cl. 4, providing for payment of interest, reference is made to payment of interest, "on such part of the purchase money "as shall for the time being remain owing." Finally, there is the very significant circumstance that whereas the four areas specified are all approximately the same acreage, each about 40 acres, the purchase price is so spread that, apart from the deposit, which was a deposit as a guarantee of the performance of the agreement, the defendant has had to pay as the first instalment 12,600*l*. in respect of the first plot which is only 40 acres. The reason for that arrangement I have already referred to earlier in this judgment. In my view, on the true construction of this document, it is impossible to say that it is a document containing a series of contracts, but it is a document evidencing a contract to buy for a total price of 38,000*l*., 160 acres of land, the contract to be worked out by the splitting of the land into four equal areas and the attribution of an unequal sum to one area and the attribution of three equal smaller sums to the other three areas. Therefore, it is not possible to say that when the first conveyance has been carried out there remains a contract which can stand by itself, so far as the relief of rescission is concerned.

Taking that view of the contract, which I feel bound to

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take on its true construction, and having such guidance as I have in the authorities, in my judgment, the relief of rescission is not open to the plaintiff in this case.

For those reasons I must refuse the plaintiff relief under both the heads under which he claims and dismiss the action with costs.

Action dismissed.

Solicitors: *Elvy Robb & Co.; Payne & Co.*

F. R. D.

VAISEY J.

1949

July 13.

In re ARMITAGE'S CONTRACT

ARMITAGE *v.* INKPEN

Vendor and purchaser—Sale of requisitioned property by auction—Statement in particulars of sale " War Damage. Any sums to " be received as compensation from the requisite government depart- " ments shall belong and be paid to the vendor "—De-requisitioning of property subsequently to sale—No damage to property by enemy action—Amount of compensation payable under s. 2, *sub-s.* 1 (*b*), *of Compensation* (*Defence*) *Act,* 1939, *agreed between vendor, purchaser and War Department's land agent—" Compensation "—" War " Damage "—Compensation* (*Defence*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*b*).

By s. 2, sub-s. 1, of Compensation (Defence) Act, 1939: " The " compensation payable under this Act in respect of the taking " possession of any land shall be the aggregate of the following " sums, that is to say . . . . (*b*) a sum equal to the cost of making " good any damage to the land which may have occurred during " the period for which possession thereof is so retained . . . . " [i.e., retained in the exercise of emergency powers].

In 1945 a purchaser bought at an auction from a vendor a bungalow then under requisition by the government and signed a memorandum of agreement to complete the purchase " in " accordance with the within conditions of sale." On the front page of the particulars, headed " General remarks and stipu- " lations," were nine paragraphs, headed respectively: " Tenure," " Outgoings," " Tenancies," " Easements," " Particulars," " Roads," " Town Planning," " Walls and Fences " and " War Damage." After " War Damage," in large print, came, in small print, " Any sums to be received as compensation from " the requisite government departments shall belong and be " paid to the vendor." The property was ultimately de-requisitioned. It had never suffered " war damage " i.e., injury by enemy action, but there was a claim arising not under the War Damage Act, 1943, but under the Compensation (Defence) Act, 1939, on the owner's behalf against the government for compensation for the time during which the owner had been deprived of the enjoyment of it by the requisitioning. The vendor, the purchaser and the War Department's land agent having agreed the amount payable under s. 2, sub-s. 1 (*b*), both the vendor and the purchaser claimed to be entitled to it.

On a summons by the vendor for a declaration that, on the true construction of the contract, it should belong and be payable to him :—

Held, in deciding that it belonged and must be paid to the vendor : (1.) that, had there been both actual " war damage " and a claim for compensation under the Compensation (Defence) Act, 1939, the words following the words " War Damage " would have covered both ; (2.) that the words following the words " War Damage " were not limited to what was defined statutorily as " war damage " under the War Damage Act, 1943, but extended to compensation properly so called under the Compensation (Defence) Act, 1939, so that, accordingly, the sum which had been or could be received by the purchaser was compensation under the latter Act.

VENDOR AND PURCHASER SUMMONS taken out by a vendor for a declaration that, according to the true construction of a contract dated July 14, 1945, for the sale of a freehold bungalow and made between the vendor and the purchaser, the sum to be received by the purchaser as compensation under s. 2, sub-s. 1 (*b*) of the Compensation (Defence) Act, 1939, should belong and be paid to the vendor.

On July 14, 1945, the bungalow, owned by the vendor and then under requisition by the government, was put up for sale by auction and bought by the purchaser, who signed a memorandum of agreement to complete the purchase "in " accordance with the within conditions of sale." The first page within the cover of the particulars of sale was headed " General remarks and stipulations " the successive nine paragraphs on that page being prefaced respectively by the words " Tenure," " Outgoings," " Tenancies," " Easements," " Particulars," " Roads," " Town Planning," " Walls and " Fences " and " War Damage." The words " War Damage," in large print, were followed by the words " Any sums to be " received as compensation from the requisite government " departments shall belong and be paid to the vendor " in small print. At some time subsequent to the sale the property became de-requisitioned. It never suffered any " war damage " in the statutory sense, i.e., it was never injured by enemy action, but, as it had been requisitioned, there was a claim on behalf of the owner against the government to be compensated for the time during which the owner had been deprived of the enjoyment of it. That claim arose, not under the War Damage Act, 1943, but under the Compensation (Defence) Act, 1939. The amount of the compensation payable under s. 2, sub-s. 1 (*b*) of that Act was agreed between the vendor, the purchaser and the War Department's land agent. The vendor and the purchaser both claimed to be entitled to it. The summons was heard with witnesses and it was stated in evidence that a conversation took place in the auction room making it quite clear to all that the money was to be paid to the vendor. The purchaser and witnesses for him testified to having normal hearing and never having heard any such conversation.

L. J. Solley for the vendor as applicant. The words in question are amply wide enough to cover compensation properly so called, under the Act of 1939, which, as the property was never injured by enemy action and the claim is for compensation "in respect of the taking possession," i.e., of the requisitioning, is the only kind that is or can be claimed in this case. The question is simply and solely one of the construction of the particulars, and evidence of what the purchaser did or did not hear is quite irrelevant. True, the sentence itself is immediately preceded by the words "War Damage:" but they are not part of the sentence; and, even if they were, they could not mean that money to be paid as "compensation ". . . . in respect of the taking possession" of the property, even if it was, as the sub-section provides, "a sum equal to "the cost of making good any damage to the land," is to be treated as payment in respect of damage by enemy action. The bungalow does need repair: but that need arose out of its having been requisitioned, not as a result of enemy action. On the true construction of the contract the vendor is entitled to the money.

J. A. Wolfe for the purchaser as respondent. If the words "War Damage," in their position and context, do not mean that the compensation referred to in the sentence immediately following them is compensation for war damage, they have no meaning at all and ought not to have been used. The "sums to be received as compensation" are being paid to defray the cost of repair as much as to provide " compensation " in respect of the taking possession." The vendor has parted with the property and so is not interested in its being repaired : and if the court accepts the contention for him as correct, the result will be that he will have both the purchase money and a sum intended to be used for the repair of the property. In spite of the use of the words " as compensation," the sentence in question in the particulars is governed by the words " War " Damage." They indicate clearly that the " sums to be received as compensation " are to be treated as paid under the Act of 1943 : and as it is the purchaser and not the vendor who is now interested in the property, the purchaser ought to receive them.

VAISEY J. The question is simply whether the sentence " Any sums to be received as compensation from the requisite " government departments shall belong and be paid to the " vendor " covers compensation under the Compensation (Defence) Act, 1939 or whether it is confined to what is not called compensation, but is in a sense compensation, under the War Damage Act, 1943. I agree that the prefatory or marginal words " War Damage " are not very well chosen. They are in the nature of shorthand. I have no doubt at all that, had there been some war damage and some claim for compensation under the Compensation (Defence) Act, 1939, the words in the sentence would have covered both. The fact is that only one claim was leviable, viz., the claim for compensation for requisitioning, and I have no doubt that the words are apt to cover that—more apt in fact, to cover that than they would have been to cover " war damage " properly so-called, because the payments which fall to be made to the subject in respect of requisitioning are in the strictest sense, in the technical sense and in the statutory sense, compensation. Although I understand that there was some conversation in the sale room as to what these words meant, I cannot think that any evidence about that is admissible, and I will accept, for the present purposes, Mr. Wolfe's statement made to me on instructions that his client, the purchaser, never heard any such conversation. The matter stands or falls entirely on the words of the contract. It may be that the words " War Damage " were misleading in the innocent sense, but this is not an action for rescission of the contract ; it is not an action for fraud ; it is not an action for mistake ; it is not an

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action in which specific performance is being resisted or anything of that kind. It is a summons raising the purest and simplest straightforward question of construction that it is possible to imagine—does " Any sums to be received as " compensation from the requisite government departments shall belong and be paid to the vendor " extend to the compensation properly so-called under the Compensation (Defence) Act, 1939, or is it limited to what is defined statutorily as war damage under the War Damage Act, 1943 ? In my judgment, on the true construction of this contract, the sum which has been or can be received by the respondent, the purchaser, is compensation under the Compensation (Defence) Act, 1939, and belongs to and must be paid to the applicant, the vendor. I make the declaration in the terms that I have indicated, and the respondent must pay the costs of the summons.

Declaration accordingly.

Solicitors : *H. L. Lumley & Co. ; Faithful, Owen & Fraser, for Archibald C. Forman, Twickenham, Middlesex.*

K. R. A. H.

ROXBURGH J.

1949

July 27.

In re DAVIDSON, DECD.

NATIONAL PROVINCIAL BANK, LD. *v.* DAVIDSON AND OTHERS.

Will—Construction—Devises and bequests to named son and granddaughter of husband by first wife describing them as " my son " and " my granddaughter "—Residuary devise and bequest on trust for " . . . . my grandchildren . . . ."—Only child of testatrix an unmarried daughter—Validity.

A testatrix by her will made in 1947 made specific bequests to " my son John Foster Davidson " and " my granddaughter " Nora Margaret Davidson," created a trust for the payment of certain income " to my son John Foster Davidson during his life " and devised and bequeathed her residuary estate on trust for " such of my grandchildren as shall attain the age of 21 years or " previously marry and if more than one in equal shares " absolutely." The testatrix died also in 1947.

In 1906 she had married, in Sweden, John Davidson, the husband of her deceased sister who had died in 1902, leaving her surviving her son John Foster Davidson, the one child of her marriage to John Davidson. The marriage of 1906 became valid by virtue of the Deceased Wife's Sister's Marriage Act, 1907. John Foster Davidson, then aged five years, lived with his father John Davidson and the testatrix, who always treated him and spoke of him as her son. The only child of the marriage of 1906 was Kathleen Nora Davidson who, up to the date of this summons, had not married. John Davidson died in 1922. His son, John Foster Davidson, married and had two children, Donald John Davidson and Nora Margaret Davidson, both infants at the date of this summons, which, because it was uncertain whether they were to be regarded as grandchildren for the purposes of the will, was taken out by the trustee thereof to decide whether, on the true construction of the will, such of them as attained the age of 21 years or previously married were entitled to the residuary estate of the testatrix and if more than one in equal shares.

Held, in deciding that such of them as attained that age or married were so entitled, (1.) that the testatrix had not made any mistake in her use of language but had plainly, deliberately and well knowing the facts to be otherwise described John Foster Davidson as her son and Nora Margaret Davidson as her granddaughter and had used the word "grandchildren" in a sense peculiar to herself but plainly indicated in the will; (2.) that neither Nora Margaret Davidson nor Donald John Davidson could be excluded from the class of grandchildren.

In re Cozens [1903] 1 Ch. 138, and *In re Green* [1914] 1 Ch. 134, followed.

In re Winn [1916] W. N. 366, not followed.

ADJOURNED SUMMONS taken out by the bank as trustee of the will dated August 18, 1947, of a testatrix, Mrs. Maude Kathleen Davidson, who thereby made specific bequests to "my son John Foster Davidson," "my granddaughter "Nora Margaret Davidson" and "my daughter-in-law "Elsie Margaret Davidson." She bequeathed certain stocks, bonds and moneys to the bank on trust to pay the income thereof "to my son John Foster Davidson during his life" and directed that after his death the same should fall into her residuary estate: and she devised and bequeathed her residuary estate to the bank on trust for "such of my grand-"children as shall attain the age of 21 years or previously "marry and if more than one in equal shares absolutely." On August 20, 1947, the testatrix died.

The testatrix was the widow of John Davidson, who had died on March 7, 1922. Before his marriage to her, he had been the husband of her sister, who had died on February 14, 1902, and of that marriage there had been one child, John Foster Davidson, a defendant to this summons. John Davidson and the testatrix were domiciled and normally resident in England, but went to Sweden early in 1906 and in July of that year were married there. The marriage was or became legal by virtue of the Deceased Wife's Sister's Marriage Act, 1907. They returned to England and the defendant John Foster Davidson who, at the time of his father's second marriage, was five years old lived with them. Evidence given in an affidavit in support of the summons was that he stated that the testatrix acted as a mother to him, always regarding him and speaking of him as her son. Of the marriage between the testatrix and John Davidson there was one child only, Kathleen Nora Davidson, a defendant to this summons, who informed the bank's solicitors that she had never been married. The defendant, John Foster Davidson, married and had two children, Donald John and Nora Margaret Davidson, both of whom were defendants to this summons and were respectively ten and eight years old at the date thereof. It being uncertain whether, for purposes of the will, they were or were not to be regarded as grandchildren of the testatrix, the bank, on April 5, 1948, took out this summons to decide whether, on the true construction of the will, such of them as attained the age of 21 years or previously married were entitled to the residuary estate of the testatrix and if more than one in equal shares absolutely.

F. Bower Alcock for the bank.

Peter Foster for John Foster Davidson and Nora Margaret Davidson. As the authorities stand, the only rule properly applicable is that formulated by Swinfen Eady J. in *In re Cozens* (1). There he had to consider on the one hand *Smith* v. *Lidiard* (2), *Wells* v. *Wells* (3) and *Merrill* v. *Morton* (4), which were cited in support of the contention that a misdescription of a wife's niece or a great-niece as a " niece " in one part of a will will not enlarge the meaning of the word " niece " in another part of it and, on the other, *In re Jodrell* (5) which, it was argued, overruled those cases and established that, once a legatee had been incorrectly described in a will, the misdescription, right through the will, applied not only

(1) [1903] 1 Ch. 138, 143.
(2) (1857) 3 K. & J. 252.
(3) (1874) L. R. 18 Eq. 504.
(4) (1881) 17 Ch. D. 382.
(5) (1890) 44 Ch. D. 590; [1891] A. C. 304.

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to him but to all others who were in the same degree of relationship. Swinfen Eady J. thought both contentions too rigid and far-reaching and accepted neither. Instead, he formulated the far more elastic rule of taking a will in its entirety, considering its language, the expressions used in it and their context and, in the light of those considerations and of all proper evidence, establishing exactly who was intended to benefit. Sargant J., in *In re Green* (1), accepted that the enlargement of meaning would be prevented by *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3) if they were binding, but apparently accepted the contention that *In re Jodrell* (1) left him free from authority. True, Eve J. in *In re Winn* (5) took the very definite line of saying that, as neither *In re Jodrell* (4) nor any other case had overruled *Smith* v. *Lidiard* (2) or *Wells* v. *Wells* (3), he was bound by them and so compelled to follow the practice against enlargement of meaning. As, however, Sargant J. has agreed with Swinfen Eady J., the rule laid down by Swinfen Eady J. ought to be applied in the present case. It thus follows that, on the language of the will, Nora Margaret is to be considered to be the granddaughter of the testatrix. She has so described her: and the description follows that of her father as the testatrix's son. The testatrix knew exactly what she was saying, i.e., knew that the description was in each case incorrect. Nevertheless, she used it and all the evidence goes to show that she did so deliberately. She thought and spoke of John Foster Davidson as her son, although in fact he was not: and it was perfectly natural—indeed, followed logically and in common sense—that she should think of and describe Nora Margaret Davidson—who is John Foster Davidson's daughter—as her granddaughter.

R. J. S. Thompson for Donald John Davidson. True, Donald John Davidson has not been mentioned by name in the will: but, if the court accepts the testatrix's description of Nora Margaret Davidson as "my granddaughter," he must by necessary implication be included in the words "my "grandchildren." Those words themselves import more than one person: and he is the only other who can fit the description as he is Nora Margaret's brother and is the only other child of the man whom the testatrix described as "my son."

(1) [1914] 1 Ch. 134, 137, 138.
(2) 3 K. & J. 252.
(3) L. R. 18 Eq. 504.
(4) (1890) 44 Ch. D. 590; [1891] A. C. 304.
(5) [1916] W. N. 366.

Accordingly, they are both to be regarded as her grandchildren for the purposes of the will on the true construction of which, therefore, such of them as attain the age of twenty-one years or previously marry are entitled to the residuary estate and if more than one in equal shares absolutely.

L. R. Norris for Kathleen Nora Davidson. Certainly Swinfen Eady J. formulated a rule very clearly in *In re Cozens* (1): but he appears, in so doing, to have disregarded the careful restriction of meaning prescribed by *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3) as well as declining to go the whole way with *In re Jodrell* (4). Whatever his view of *In re Jodrell* (4) may have been, he went too far in disregarding the other two cases which Eve J., in *In re Winn* (5) considered sufficiently binding to make him decide the other way. His decision was correct. Even if, however, the court takes the view that it was not but that the proper course is to apply, not the principle in *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3) but the rule formulated by Swinfen Eady J. in *In re Cozens* (1), the court, to "determine . . . . the meaning of the expressions ". . . . and the persons who are entitled to share in the "benefits . . . ." must at least find a clear context in the will. Whatever the testatrix may have had in her mind and may have intended to convey by using words to which she attached her own special meanings, she did in fact use a misdescription in every case—the words "son," "grand-"daughter" and "grandchildren": and the mere misdescription of a beneficiary is not enough to show to the court the clear context which it must have before it in order to bring the infant defendants within the description "grandchildren." The court ought therefore to hold that they are not to be regarded as grandchildren for the purposes of the will and ought to hold that the residuary estate is undisposed of.

ROXBURGH J. The evidence that John Foster Davidson stated that the testatrix always acted as a mother to him, always regarding him and speaking of him as her son is, if admissible, relevant only as showing that the testatrix in her will was not guilty of falsa demonstratio.

The testatrix has quite plainly, not once but two or three times, put John Foster Davidson and his family into an

(1) [1903] 1 Ch. 138, 143.
(2) 3 K. & J. 252.
(3) L. R. 18 Eq. 504.
(4) (1890) 44 Ch. D. 590; [1891] A. C. 304.
(5) [1916] W. N. 366, 367.

artificial position of relationship to herself. He was not her son, but she so describes him twice in the will. Nora Margaret Davidson was not her granddaughter, but she so plainly describes her once in the will. Elsie Margaret Davidson was not her daughter-in-law, for she had no daughter-in-law, and I have little doubt that Elsie Margaret Davidson was the wife of John, though that is not proved.

There is, to my mind, no question of any mistake in the use of language. She knew perfectly well that John Foster Davidson was not her son, but she did not call him her son by inadvertence: she called him her son because she chose to describe him by that designation and she did it, in my judgment, deliberately. Equally well she knew that Nora was not her granddaughter, but she did not use the word by inadvertence: she chose, and deliberately, to describe Nora as standing in that relationship to her. Apart from authority, to which I will refer in a moment, the testatrix has, in my view, plainly used the word "grandchildren" in a sense quite peculiar to herself but clearly indicated in her will.

I consider it impossible to exclude from the class of grandchildren Nora Margaret Davidson, who is described as her granddaughter, being the daughter of the man described as the testatrix's son; equally impossible to exclude the other child, Donald John Davidson, being the child of the same John Foster Davidson, described as her son, and being a brother of Nora.

It is, however, submitted that authority debars me from so concluding, and at one moment I thought that it did. The point has been the subject-matter of no little judicial skirmishing, the nature of which is indicated by a passage in the judgment of Swinfen Eady J. in *In re Cozens* (1). That case related to a different description of relationship, but that is immaterial for the present purpose.

Swinfen Eady J. said: "It was contended on the one hand "that the cases of *Smith* v. *Lidiard* (2), *Wells* v. *Wells* (3) "and *Merrill* v. *Morton* (4) establish the proposition that the "fact that a great-niece or a wife's niece has been previously "called a niece will not enlarge the meaning of the word "'niece' in another part of the will.

"It was contended on the other hand that these cases were

(1) [1903] 1 Ch. 138, 142.
(2) 3 K. & J. 252.
(3) L. R. 18 Eq. 504.
(4) 17 Ch. D. 382.

"overruled by *In re Jodrell* (1), *Seale-Hayne* v. *Jodrell* (2) "—see *In re Gue* (3)—and that the rule now is that where "a legatee has once been referred to by an inaccurate "description in a will, the same description in all other "parts of the will must be treated as including that "person, and all others in the same degree of relationship. "In the case of *In re Jodrell* (1), in the Court of Appeal, "Lord Halsbury repudiated entirely the notion of laying "down any canon of construction which was to extend beyond "the particular instrument that he was called upon to give "an interpretation to . . . .

"I am of the opinion that both the propositions contended "for were too widely stated. There is not any hard and fast "rule that a gift to nieces does not include a great-niece, "where in another part of the same will a great-niece is "described as a niece; nor, on the other hand, is there any "hard and fast rule that, whenever a great-niece has once "been referred to in a will as a niece, the expression 'niece' "must in all other parts of the will be taken to include great-"nieces.

"The true rule is to determine by the language and context "of each will, including the consideration of the whole "instrument and any evidence properly admissible, the "meaning of the expressions contained in it, and the persons "who are entitled to share in the benefits thereby conferred."

Swinfen Eady J. had no power to overrule *Wells* v. *Wells* (4), still less *Smith* v. *Lidiard* (5); but he appears to me to have been deliberately declining to treat as obligatory a principle seemingly established by those cases.

The next judge to deal with this little controversy was Sargant J. in *In re Green* (6) and, in my judgment, he must be treated as having agreed with Swinfen Eady J. that no binding rule was laid down by *Smith* v. *Lidiard* (5) and *Wells* v. *Wells* (4) because he says: "There is a good deal of authority "on the point, and the cases of *Smith* v. *Lidiard* (5) and *Wells* "v. *Wells* (4) would be conclusive against the larger construction if I were bound by them as authorities. But I have "been referred to *In re Jodrell* (1), which is said to amount "to a negation of all authority in a case like this, and I take "it that I am cast at large as regards the interpretation to

(1) 44 Ch. D. 590.
(2) [1891] A. C. 304.
(3) [1892] W. N. 132.
(4) L. R. 18 Eq. 504.
(5) 3 K. & J. 252.
(6) [1914] 1 Ch. 134, 137, 138.

" be put on the words used and am not bound by any reported " decision, although I think I may derive assistance from the " authorities cited to me."

In fact, Sargant J., as the sequel shows, found assistance from *Smith* v. *Lidiard* (1) and *Wells* v. *Wells* (2), but none from *In re Jodrell* (3).

The next judge to grapple with the problem was Eve J. in *In re Winn* (4). The report of the relevant part of his judgment is as follows: " Three instances of the use in " the earlier part of the will of the words ' my niece ' were " pointed out where the testator referred to his wife's niece, " and two of these nieces were expressly included in the " residuary devise. Upon that point there were two direct " authorities which had been relied upon, *Smith* v. *Lidiard* (1) " and *Wells* v. *Wells* (2), and the two learned judges who " decided those cases expressed a clear and unqualified opinion " that the mere fact that a testator had in the earlier part " of his will attached to a legatee what was in fact a mis- " description, did not operate to extend a residuary gift so " as to include the class of persons so described in the earlier " part of the will. Neither of these two cases had been " overruled in *In re Jodrell* (3) and he was not going to be so " presumptuous as to differ from the conclusions which " Jessell M.R. and Page-Wood V.-C. had expressed. If " those cases were to be overruled, it must be by some other " court. His Lordship therefore held that the mere fact " that the testator had described certain of his wife's nieces " as ' my nieces ' in the prior part of his will did not operate " to bring all his wife's nephews and nieces within the residuary " devise."

The position, therefore, is that two judges have thought themselves unfettered by authority on this matter and one has thought himself fettered. I hope that I shall not be accused of presumption because I am driven to go either with the majority or with the minority, and I prefer to go with the majority. In my view, the rule is correctly laid down by Swinfen Eady J. in the passage which I have read (5): " The true " rule is to determine by the language and context of each will, " including the consideration of the whole instrument and any " evidence properly admissible, the meaning of the expressions

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(1) 3 K. & J. 252.
(2) L. R. 18 Eq. 504.
(3) 44 Ch. D. 590.
(4) [1916] W. N. 366, 367.
(5) [1903] 1 Ch. 138, 143.

"contained in it, and the persons who are entitled to share "in the benefits thereby conferred."; and, in my view, there is no rule of construction which ought to induce a judge to depart from that line of approach. Accordingly, I feel free to reach the conclusion which I should have reached apart from all authority and which I have already stated.

I will declare that the residuary trust estate is held on trust for such of the defendants, Nora Margaret Davidson and Donald John Davidson, as shall attain the age of twenty-one or previously marry and, if more than one, in equal shares absolutely.

Declaration accordingly.

Solicitors: *Peacock and Goddard, for Lacey & Son, Westbourne, Bournemouth; Maude and Tunnicliffe, for MacDonald, Jacobs and Oates, Portsmouth.*

K. R. A. H.

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In re HARRISON'S WILL TRUSTS.
In re HARRISON'S SETTLEMENT.

HARRISON AND OTHERS *v.* MILBORNE-SWINNERTON-PILKINGTON AND OTHERS.

Company—No power in articles to increase capital—Moneys arising from realization of capital assets—Resolution to distribute among members "on footing that they receive same as capital"—Payment to trustees of settlement of sum attributable to settled shares—Whether income or capital.

A testator by his will made in 1916 bequeathed his shares in a company to the trustees thereof who, at the date of this summons, held some of them on the trusts of the will and of a re-settlement effected by a disentailing deed and a settlement both executed in 1947. The company had not power in its articles to increase its capital but, in 1919, adopted an article enabling it at any time to resolve that any surplus moneys in its hands representing moneys received or recovered in respect of or arising from any of its capital assets or any investments representing them be distributed among its members on the footing that they receive them as capital. The company made distributions under the article and the trustees of the will applied the sums which they received in respect of the shares held by them as capital. Doubts as to the correctness of so doing having arisen, in 1949 they took out this summons to decide whether a sum received by them in 1948 and attributable to the shares held under the will and the re-settlement of 1947 ought to be treated as income or as an accretion to the capital of the shares.

Held, in deciding that it ought to be treated as income for the purposes of the will and the subsequent settlement, that the principle that, if a company had no power under its articles to increase its capital, it could distribute to its shareholders money impressed with the obligation that it should be treated as part of the capital of a settled property as between tenant for life and remainderman was entirely inconsistent with the principles enunciated in *In re Doughty* [1947] Ch. 263, and with those laid down by Lord Russell of Killowen in *Hill* v. *Permanent Trustee Co. of New South Wales* [1930] A. C. 720.

In re Doughty (supra), in which the Court of Appeal expressed disapproval of *In re Ward's Will Trusts* [1936] Ch. 704, followed.

SUMMONS to determine whether a sum of money arising from realization of capital assets of a company which had no power in its articles to increase its capital, which sum was paid by the company, pursuant to its articles, to certain of its members on the footing that they received it as capital and was attributable to settled shares in the company's capital held by them as trustees, was to be treated as income or as capital.

By his will made in 1916 a testator bequeathed to the trustees thereof all his shares in the Charente Steamship Co., Ld., on trust to stand possessed thereof on the trusts which would have been applicable had they been interim investments of capital moneys arising under the Settled Land Acts, 1882 to 1890, from a sale of part of the hereditaments thereinafter specifically devised. He devised certain freeholds to the use of his son, the first plaintiff, for life, with remainder to the use of the first plaintiff's first and every other son successively according to their seniority in tail male with remainder to the use of the first plaintiff's first and every other son successively in tail with remainder to the use of the first plaintiff's first and every other daughter in tail with divers remainders over. In 1916 the testator died, being then registered holder and beneficial owner of 155 shares in the company's capital. In the events which happened the trustees at all material times held 134 shares in the company's capital. The first plaintiff had no sons, but had eight daughters, of whom the first defendant, Lady Milborne-

Swinnerton-Pilkington, was the eldest. Lady Milborne-Swinnerton-Pilkington had four children, all infants at the date of this summons. By a deed of June 30, 1947, Lady Milborne-Swinnerton-Pilkington disentailed her interests in the freeholds, certain investments and the 134 shares. By a settlement dated July 1, 1947, the first plaintiff and Lady Milborne-Swinnerton-Pilkington according to their respective interests conveyed to the trustees thereof certain investments and property (including 67 of the shares) and the income thereof to hold the same on the trusts thereinafter declared: and it was provided that the conveyance and the settlement were made subject to the estates in tail male and in tail of the sons (if any) of the first plaintiff under the will. The settlement provided that, subject as thereinbefore declared, the income of the trust property should be paid to Lady Milborne-Swinnerton-Pilkington during her life, contained certain powers of appointment exercisable by her, and then provided that, subject as thereinbefore declared, the trust property should be held in trust for her children as Lady Milborne-Swinnerton-Pilkington should appoint and, in default of appointment, in trust for all who should being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares. At the date of this summons Lady Milborne-Swinnerton-Pilkington had not made any appointment under any of the powers in the settlement.

In 1919 the company had adopted the following article: "67A. The company in general meeting may from time to "time and at any time resolve that any surplus moneys "in the hands of the company representing the moneys "received or recovered in respect of or arising from the "realization of any capital assets of the company or any "investments representing the same instead of being applied "in the purchase of other capital assets or for other capital "purposes be distributed amongst the members on the footing "that they receive the same as capital and in the shares and "proportions in which they would have been entitled to "receive the same if it had been distributed by way of dividend. "For the purposes of this provision surplus money or "investments means money or investments in the hands "of the company over and above a sufficiency of other assets "to answer in full the whole of the liabilities and paid up "share capital of the company for the time being." From

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time to time the company made distributions under that article and the trustees of the will received sums in respect of the shares held by them. Relying (save as to the earliest distribution) on *In re Ward's Will Trusts* (1) and on a clause in the will enabling them to determine whether any moneys were to be capital or income, they applied the sums as capital.

In 1948, pursuant to a resolution passed pursuant to the article that 92,160*l.* be distributed among the members as capital, the company paid to the trustees 24,120*l.* in respect of the 134 shares held by them as trustees of the will, of which 12,060*l.* was attributable to the 67 held under the will and the re-settlement effected by the disentailing deed and the settlement of 1947.

In *In re Doughty* (2) the Court of Appeal questioned the decision in *In re Ward's Will Trusts* (1) and by this summons, issued on March 7, 1949, the trustees of the will, one of whom was also a trustee of the settlement of 1947, asked, inter alia, whether the 12,060*l.* (*a*) ought to be treated as income to which Lady Milborne-Swinnerton-Pilkington was entitled absolutely, or (*b*) the same or any part thereof ought to be treated as an accretion to the capital of those shares.

R. J. T. Gibson for the plaintiffs.

Russell K.C. and *P. E. Whitworth* for Lady Milborne-Swinnerton-Pilkington. The sum is income. True, it came into the hands of the will trustees as surplus money distributed pursuant to a resolution passed pursuant to Article 67A. True also, under a clause in the will, the will trustees can determine whether moneys received by them are to be capital or income. Those considerations, however, do not enable the will trustees to act contrary to the authorities. This sum represents surplus capital moneys and capital profits in the hands of the company, is attributable to the 67 shares held under the will and the re-settlement and comes within the provision of the 1947 settlement that the income of the trust property is to be paid to Lady Pilkington for life. Accordingly, it is to be treated as income—*In re Bates* (3), *Hill* v. *Permanent Trustee Company of New South Wales* (4), and *In re Doughty* (2)—and Lady Pilkington is entitled to it absolutely.

Stranders for the infants. This sum should be treated,

(1) [1936] Ch. 704.
(2) [1947] Ch. 263.
(3) [1928] Ch. 682.
(4) [1930] A. C. 720.

not as income, but as an accretion for the benefit of the infant remaindermen to the capital of the shares to which it is attributable. True, the company has no power to increase its capital. Even so, however, it can distribute the proceeds of capital assets or other money as money so as to render that money capital in the hands of the recipient and so that it forms part of the capital of a settled property and does not go to the tenant for life: see *Bouch* v. *Sproule* (1) and the cases therein cited. There is nothing inconsistent with this principle in *In re Doughty* (2) and the cases therein cited, properly considered, for those were all cases in which the company had power to increase its capital. If, however, the court takes the view that there is or may be anything inconsistent with it in those cases, then the Court of Appeal must thus far be taken to have been speaking per incuriam in view of the decisions referred to and statements made in *Bouch* v. *Sproule* (1). Further, there is no difficulty in reconciling *In re Ward's Will Trusts* (3) with this principle, and the article in *In re Doughty* (2) is worded differently from that in *In re Ward's Will Trusts* (3).

[ROXBURGH J. Yes, but the article in *In re Ward's Will Trusts* (3) is the same as in the present case because the company is the same as in the present case: and you are asking me to follow that case notwithstanding that the Court of Appeal has disapproved of it in *In re Doughty* (2): and your principle is quite contrary to the principles set forth in *In re Doughty* (2) and *Hill* v. *Permanent Trustee Co. of New South Wales* (4).]

That is only because, in *In re Doughty* (2), Cohen L.J. had not observed that, in *Hill* v. *Permanent Trustee Co. of New South Wales* (4), Lord Russell of Killowen was referring only to cases where companies had power under their articles to increase capital. Here, the company has not.

[ROXBURGH J. How does that make any difference to the applicability to this case of the decision in *In re Doughty* (2) ?]

The answer to that question will involve a thorough examination of all the decisions referred to in *Bouch* v. *Sproule* (1) and also of other cases.

If the contentions for the remaindermen are incorrect, it must follow that a company which has not power to increase its capital can never make a capital distribution without reducing its paid up share capital, i.e., without obtaining the leave of the court.

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(1) (1887) 12 App. Cas. 385.
(2) [1947] Ch. 263.
(3) [1936] Ch. 704.
(4) [1930] A. C. 720.

J. A. Plowman for the remaining trustees of the settlement of 1947.

ROXBURGH J. In view of *In re Doughty* (1) and the Court of Appeal's strong disapproval therein of *In re Ward's Will Trusts* (2), I am bound to hold that the payments are to be treated as income for the purposes of the will and settlement.

Mr. Stranders for the infants has propounded the following propositions: First, he correctly draws attention to the fact that the words of the company's article in *In re Doughty* (1) differ from those of the company's article in *In re Ward's Will Trust* (2), but, in fact, the words of the company's article in the present case are identical with those of the company's article in *In re Ward's Will Trusts* (2), because it is the same company.

The second line of attack was this. He says that the Court of Appeal was wrong in disapproving of *In re Ward's Will Trusts* (2), an argument which should be addressed to that court rather than to me. None the less, it was essential for me to pursue that submission up to a certain point and Mr. Stranders puts it this way: He says that if a company has no power under its articles to increase its capital, it may distribute money to the shareholders impressed with the obligation that it shall be treated as capital as between tenant for life and remaindermen under the settlement.

He contended that there is nothing inconsistent with this principle in *In re Doughty* (1) and the cases there cited, properly considered, for they are all cases in which the company had that power; that, if there is anything inconsistent with *In re Doughty* (1), the Court of Appeal must have expressed its disapprobation of *In re Ward's Will Trusts* (2) per incuriam, and that *In re Ward's Will Trusts* (2) was decided in accordance with the principle which he has enunciated. Next, he said that there is no difficulty in reconciling *In re Ward's Will Trusts* (2) with the principle which he has enunciated. There is indeed no difficulty in so doing: but of course, *In re Ward's Will Trusts* (2) was the case on which I relied in my decision in *In re Doughty* (1) which the Court of Appeal reversed, taking that opportunity of expressing strong disapproval of *In re Ward's Will Trusts* (2). So that does not carry Mr. Stranders very far.

(1) [1947] Ch. 263.

(2) [1936] Ch. 704.

The contention that *In re Ward's Will Trusts* (2) was decided in accordance with the principle enunciated by Mr. Stranders I must unfortunately reject. I have carefully examined *In re Ward's Will Trusts* (1) and, quite clearly, it was not so decided: for, although Clauson J. did refer to the circumstance that the company had no power under its articles to increase its capital, I cannot find that circumstance anywhere in his reasons for his decision.

According to Mr. Stranders there is nothing in the principle which he has enunciated inconsistent with *In re Doughty* (2). Perhaps there is not, so far as concerns actual decision: but, in my judgment, it is entirely inconsistent with the principles enunciated in that case.

In *In re Doughty* (3), Cohen L.J., referring to *Hill* v. *Permanent Trustee Co. of New South Wales* (4) said: "In the "course of his judgment Lord Russell of Killowen laid down "five principles which I read as meaning to be statements of "general principles, not confined to that particular case." It appears to me that the principle enunciated by Mr. Stranders is entirely inconsistent with those five principles. Mr. Stranders says that that may be so, but only because Cohen L.J. omitted to notice that Lord Russell of Killowen was referring only to cases where the company had power under its articles to increase its capital.

The Court of Appeal has disapproved in strong terms of *In re Ward's Will Trusts* (1). True, it has not overruled it: but not one member of the Court of Appeal, in suggesting how *In re Ward's Will Trusts* (1) might possibly be supported, suggested this argument as a reason. I cannot but think that they omitted to suggest it because they did not think it a good reason, and, as I too cannot see why it should be a good reason, the matter must be left there in this court. The only thing which could induce me to say that the Court of Appeal was wrong in disapproving *In re Ward's Will Trusts* (1) would be either a decision of the Court of Appeal to the contrary or a decision of the House of Lords to the contrary. As no case of that type has been put before me, I conclude that none exists.

Declaration accordingly.

Solicitors: *Pothecary and Barratt, for Hawkins & Co., Hitchin, Herts.; Withers & Co.*

(1) [1936] Ch. 704.
(2) [1947] Ch. 263.
(3) Ibid. 270.
(4) [1930] A. C. 720.

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Affirmed. H.L. [1951] 1 All E.R. 667.

Affirmed [1951] A. C. 555

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June 30; *July* 1, 6.

Evershed M.R., Somervell and Jenkins L.JJ.

SMITH *v.* LONDON TRANSPORT EXECUTIVE.

Road traffic—Public authority—British Transport Commission—London Transport Executive agent for Commission to exercise functions delegated to Executive by or under scheme made by Commission and approved by Minister—Scheme of delegation of functions sealed by Commission and approved by Minister in December, 1947*—Vesting of undertaking of London Passenger Transport Board in Commission on January* 1, 1948*—Motor omnibus service along route not within "special area" as defined by London Passenger Transport Act,* 1933 (23 *Geo.* 5, *c.* 14), *started by Executive in* 1948*—Powers of Executive—Transport Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1, *s.* 12, *s.* 14, *sub-s.* 4, *s.* 65, *sub-s.* 1.

For sixteen years before March, 1947, the plaintiff had been the only operator of motor omnibuses between Hitchin and Weston, Hertfordshire. In that month the London Passenger Transport Board informed him that they intended to operate a new service on that route, and they applied to the Regional Transport Commissioner for the Metropolitan area for a road service licence under s. 72 of the Road Traffic Act, 1930. The plaintiff lodged an objection and the Board submitted to him a suggested time table relating to their proposed service, whereupon he again lodged an objection forwarding it to the Regional Transport Commissioner. In December, 1947, the British Transport Commission constituted by the Transport Act, 1947, sealed, in exercise of their powers under the Act, a scheme of delegation of functions delegating to the London Transport Executive all the functions of the Commission (*a*) in relation to activities which the Commission were empowered to carry on by virtue of the transfer to them of the undertaking of the London Passenger Transport Board and (*b*) in relation to activities which they were empowered to carry on by virtue only of the powers conferred on them by s. 2, sub-s. 1, of the Transport Act, 1947, so far as carried on in connexion with, or so far as ancillary to, activities under (*a*). In the same month the Minister of Transport approved the scheme. On January 1, 1948, pursuant to the Act, the undertaking of the London Passenger Transport Board was vested in the Commission and in the same month the Executive applied, under s. 65 of the Act, to the licensing authority for the Metropolitan Area for "route approval" in respect of the proposed service. By a letter dated February 6, 1948, the operating manager of the Executive was informed that the licensing authority was prepared to approve the route between Hitchin and Weston being opened on February 18 and, on or about February 18, the Executive began to operate their service on that route. The plaintiff brought an action claiming that the Executive were acting outside their statutory powers in operating a service on that route (which lay outside the "special area" defined under

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

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the London Passenger Transport Act, 1933) and an injunction to restrain them from so doing.

Held (dismissing the appeal) (1.) that the British Transport Commission had power to operate a service of stage carriages along the Hitchin–Weston route subject only to obtaining route approval from the licensing authority in accordance with s. 65 of the Transport Act, 1947. In so far as the route lay outside the " special area " as defined in the London Passenger Transport Act, 1933, the Commission could rely on the general powers conferred on them by s. 2 of the Transport Act, 1947. Within that " special area " the Commission had vested in them the monopoly powers of the London Passenger Transport Board by ss. 12–15 of the Transport Act, 1947. (2.) That the power of the British Transport Commission to operate bus services on this route had been effectively delegated to the London Transport Executive by the scheme of delegation executed by the Commission.

APPEAL from Vaisey J. (1) dismissing the plaintiff's action.

The facts are sufficiently stated in the head-note and judgment.

Sir Valentine Holmes K.C. and *G. R. F. Morris* for the plaintiff. The British Transport Commission have no power to operate a bus service on the Hitchin–Weston route and therefore they cannot delegate power to the London Transport Executive. Alternatively, if the Commission have power, it is not derived from the vesting in them of the undertaking of the London Passenger Transport Board under Part II of the Transport Act, 1947, nor is the power ancillary to any powers so vested. Consequently the instrument of delegation made by the Commission cannot effectively delegate the power to the London Transport Executive.

Vaisey J. held that s. 2, sub-ss. 1 and 2, of the Transport Act, 1947 (2), gave general power to the British Transport

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(1) [1948] Ch. 652.

(2) The Transport Act, 1947, s. 2, sub-s. 1: " Subject to the " provisions of this Act, the " Commission shall have power— " (*a*) to carry goods and passengers " by rail, road and inland water- " way, within Great Britain; .... " (*f*) to provide in Great Britain " such other amenities and faci- " lities for passengers and other " persons making use of the " services provided by them as it " may appear to them requisite " or expedient to provide . . . ." Sub-section 3: " Where, " whether by agreement or other- " wise, the Commission acquire " the whole or any part of any " undertaking of any other person, " they may, subject to the pro- " visions of this Act, carry on " any activities, whether " mentioned in sub-s. 1 of this " section or not, which were " theretofore carried on for the

Commission to carry on passenger road transport services both inside and outside the London Passenger Transport area, subject only to complying with s. 65 of the Act. But s. 2, sub-s. 1, is qualified by the words "Subject to the provisions of this Act" which mean that the section can only be carried into effect as regards the various types of transport

"purposes of that undertaking or part of an undertaking or were authorised by any statutory provision to be carried on for the purposes thereof . . . ."

Section 12, sub-s. 1: "Subject to the provisions of this Act, the whole of the undertakings of the bodies of persons specified in the Third Schedule to this Act, [one of them being the London Passenger Transport Board] being the bodies who fall within the class described in the next succeeding section, shall, on the first day of January, nineteen hundred and forty-eight . . . vest by virtue of this Act in the Commission.

Section 14, sub-s. 1: "The provisions of this section shall, subject to the other provisions of this Act, have effect where, under the preceding provisions of this Part of this Act, the whole of the undertaking of any body is to vest in the Commission."

Sub-section 2: "Subject to the provisions of this section, all the property of the body immediately before the date of transfer shall vest in the Commission and, as from the date of transfer, the Commission shall, to the exclusion of the body, have all rights and be subject to all liabilities which the body had or to which the body were subject immediately before the date of transfer."

Sub-section 3: "Subject to the provisions of this section, every agreement to which the body were a party, whether in writing or not and whether or not of such nature that rights and liabilities thereunder could be assigned by the body, shall, unless its terms or subject matter make it impossible that it should have effect as modified in the manner provided by this sub-section, have effect as from the date of transfer as if—

"(a) the Commission had been a party to the agreement; . . . ."

Sub-section 4: "The provisions of the last preceding sub-section (except paragraphs (*a*) and (*f*) thereof) shall apply in relation to any statutory provision, any provision of any agreement to which the body were not a party, and any provision of any other document not being an agreement, as they apply in relation to an agreement to which the body were a party, and, in relation to any such statutory or other provision as aforesaid, the references in paragraphs (*b*), (*c*), (*d*), (*e*) and (*g*) of that sub-section to the body, to any profits or receipts of the undertaking of the body, to any directors, officers or servants of the body, and to the undertaking of the body include references made by means of a general reference to a class of persons of which the body are one, without the body themselves being specifically referred to.

"The statutory or other provisions to which this sub-section applies include statutory or

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in the way in which the Act deals with each type. Section 2, sub-s. 3, empowers the Commission to carry on the activities of undertakings acquired by agreement "or otherwise." The words "or otherwise" do not cover acquisition by virtue of the vesting provisions in Part II of the Act but refer to compulsory acquisition. Throughout the Act there is a clear distinction between acquisition (either by agreement or compulsorily) and the vesting by transfer. Even if this interpretation of s. 2, sub-s. 3, is wrong, the British Transport Commission cannot carry on this bus service by virtue of that sub-section because the operation of this service is not an activity which the old London Passenger Transport Board were entitled to carry on, as they had not obtained a road service licence.

The power to run this bus service is not vested in the British Transport Commission by ss. 12–14 of the Transport Act, 1947, the sections which vest the undertaking of the London Passenger Transport Board in the Commission. The vesting transferred the assets of the Board with what might be called "the good will of the business" but not its statutory powers. Section 14, sub-s. 4, deals with the way

"other provisions passed or made "after the passing of this Act "but before the date of transfer."

Sub-section 6: "Notwithstanding "anything in this section . . . . "(*c*) the Commission shall not, "by reason of the vesting, have "any rights or powers of the body "as respects the borrowing of "money or the raising of money "by the issue of securities, and "the provisions of sub-sections 3 "and 4 of this section shall not "apply to agreements, statutory "provisions or documents relating "to the borrowing of money "by the body or the raising of "money by the issue of securities "of the body."

Section 65, sub-s. 1: "Sections seventy-two to seventy-six "of the Road Traffic Act, 1930 "(which relate to road service "licences) shall not apply to any "passenger road transport service "provided, whether under a "scheme under the preceding "provisions of this Part of this "Act or otherwise, by the Com-"mission or by any person acting "as agent for the Commission, "but neither the Commission "nor any such person as aforesaid "shall use any public service "vehicle for the conveyance of "passengers for hire or reward "at separate fares except—(*a*) on "a route approved, as respects "so much thereof as falls within "any traffic area, by the licensing "authority for public service "vehicles for that area; and "(*b*) in accordance with such "restrictions as may be imposed "by that authority . . . . as to "the portions of the route on "which, and the points at which, "passengers may be taken up "or set down . . . ."

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in which powers are to pass. It does not assist the defendants, because it applies only to powers which actually existed at the date when the vesting took place and the only power which the London Passenger Transport Board had to run this particular service (subject to obtaining a road service licence) was derived from s. 15 of the London Passenger Transport Act, 1933 (1), which had been repealed immediately before the vesting of the London Passenger Transport Board undertaking in the British Transport Commission took place. Of course, this does not mean that the British Transport Commission could not get power to run this bus service. They could get power by purchasing the plaintiff's business or by making a scheme under ss. 63 and 64 of the Transport Act, 1947. In either case, the Act provides that persons adversely affected should receive some compensation. The defendants rely on s. 65, sub-s. 1. This section does not confer any powers on the Commission and is only relevant in this case because it shows that s. 2, sub-s. 1 (*a*), must be construed narrowly. Otherwise, it would have been unnecessary to say that the new procedure provided in that section should apply to passenger road transport services provided "whether "under a scheme . . . . or otherwise."

If the Commission have no power to operate the service, they cannot delegate power to the London Transport Executive. Alternatively, if the Commission have power but have not acquired it by virtue of the transfer to them of the undertaking of the London Passenger Transport Board, the instrument of delegation is inapt to delegate the power. Clause 2 (*a*) of the instrument only empowers the London Transport Executive to carry on activities which the Commission could carry on by virtue of the transfer to them of the undertaking of the London Passenger Transport Board. If the power is conferred by s. 2, sub-s. 1 (*a*), of the Act of 1947, as Vaisey J. apparently held, it is clearly outside the scope of that clause. Clause 2 (*b*) does not apply because it refers only to activities carried on in connexion with or which were ancillary to the activities referred to in cl. 2 (*a*). Consequently, if nothing passes under that clause, nothing passes under 2 (*b*).

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(1) The London Passenger Transport Act, 1933, s. 15, sub-s. 1: "Subject to the provisions of this "section, it shall be lawful for "the Board to provide road "services of stage and express "carriages on any of the following "roads, but not otherwise, that "is to say—(*a*) on any road "within the area described in "Part I of the Seventh Schedule "to this Act (in this Act referred "to as the 'London Passenger "'Transport Area'); (*b*) on any "road outside that area, being a "road specified in Part II or "Part III of that Schedule: ". . . . Provided that . . . . (ii) the "Board shall not both pick up "and set down a passenger on "any road specified in Part III "of the said Schedule . . . ."

Sub-section 3: "Sections seventy-"two to seventy-six, both inclu-"sive of the Road Traffic Act, "1930, shall not apply to a road "service provided by the Board "wholly within such portion "of the London Passenger Trans-"port Area as lies within the "London Traffic Area (which "portion is in this Act referred "to as 'the special area') and, "in the case of a road service "provided by the Board partly "within and partly without the "special area shall not apply to "that service in so far as it is "within the special area."

Gilbert Paull K.C., N. R. Fox-Andrews K.C. and *J. P. Ashworth* for the London Transport Executive. The question is whether the British Transport Commission had the power to run this bus service by virtue of the transfer to them of the undertaking of the London Passenger Transport Board and if so, whether the right is unrestricted or is subject to the restrictions imposed on the London Passenger Transport Board by s. 15 of the London Transport Act, 1933.

On a true construction of s. 15, it does not confer powers on the Board but limits those which the Board has. This interpretation is borne out by the scheme of the repeals in s. 128 of the Act of 1947. Most of the sections which were repealed were limiting sections; evidently the purpose of the repeals, coupled with the vesting provisions, is to give to the British Transport Commission the right and power to carry on and to increase the undertaking of the London Passenger Transport Board free from the statutory limitations imposed by the Act of 1933. The "undertaking" of the London Passenger Transport Board as defined in s. 5, sub-s. 5, and sch. II of the 1933 Act includes the power to run stage carriages subject to the limitations of s. 15 and the obtaining of a road service licence. Section 65, sub-s. 1, makes it unnecessary to obtain a road service licence and s. 15 has been repealed. Logically speaking the Commission could, therefore, operate bus services, not only inside the London Passenger Transport area but anywhere, subject only to obtaining route approval.

The power to operate on this route is not obtained under

s. 2, sub-s. 1 (*a*). but by virtue of the vesting in the Commission of the undertaking of the London Passenger Transport Board free from the statutory restrictions. Alternatively, if the vesting under ss. 12–14 does not include the statutory powers, these passed to the British Transport Commission under s. 2, sub-s. 3, for there is no doubt that "acquisition" in that section includes acquisition by "vesting." As the instrument of delegation executed by the British Transport Commission passed to the London Transport Executive all the powers acquired from the vesting in the Commission of the undertaking of the London Passenger Transport Board, the power to operate this service was effectively delegated to the Executive. If, however, this view is wrong and the right of the Commission to operate the service is derived partly from the vesting (which confers the right to run subject to the statutory restrictions imposed on the London Passenger Transport Board) and partly from the general powers under s. 2, sub-s. 1 (*a*), then the power to run this bus service has been effectively delegated to the London Transport Executive by cll. 3 and 2 (*b*) of the instrument of delegation for the right to run an unrestricted service was ancillary to the right to run the restricted service.

Sir Valentine Holmes K.C. replied.

Cur. adv. vult.

July 6. Evershed M.R. This appeal concerns the right of the plaintiff and of the defendants, the London Transport Executive, to run a passenger omnibus service for stage carriages over a route in Hertfordshire between Hitchin and Weston. By far the greater part of this route is within an area known as the London Passenger Transport area, an area defined in the London Passenger Transport Act, 1933, but a small part of it, I assume about 400 yards in length, is outside that area.

The question on the appeal is the effect of the Transport Act of 1947, which, so far as relevant, came into operation on January 1, 1948. It has been necessary to consider a number of sections in that Act, in the Road Traffic Act of 1930 and in the London Passenger Transport Act of 1933. Many of those sections are set out in full in the judgment of Vaisey J., and I shall not in this judgment read them out again. I shall make only such references to parts of those Acts as are required to make this judgment intelligible. I must, however, say this: if the defendants are entitled to succeed, as Vaisey J. (I think rightly) held, the result is undoubtedly that the position of the plaintiff, whom Sir Valentine Holmes described as a small man, being a bus operator in a relatively small way of business, has been appreciably affected for the worse by the Act of 1947, and the position of the defendants, the London Transport Executive, is appreciably stronger than its statutory predecessor, the London Passenger Transport Board, in the area in question. That is, I think, the result of two words, namely "or otherwise" which are found in s. 65 of the Act of 1947. If I am right, I must, of course, assume that result to be deliberate, but it is not one which I think would be expected from a cursory reading of the Act and the arrangement of the sections, and I am not, therefore, entirely surprised that the plaintiff has felt somewhat aggrieved. For many years he has operated a bus route for stage carriages over this road on three days during the week. In March, 1947, the London Passenger Transport Board applied for a road service licence under s. 72 of the Act of 1930 for running a bus service over this same road. That application they were then bound to make; the Passenger Transport Board and anybody else who wanted to run a bus route over this section of the country was bound to obtain a road service licence under the Act of 1930.

The plaintiff opposed the application, as he was entitled to do, and it was still pending when the Act of 1947 came into operation. By virtue of that Act, the defendants, as successors of the London Passenger Transport Board, claim that they are now entitled to operate the bus service in question without complying with the formalities of s. 72 of the Act of 1930, provided only that they obtain a "route approval" from the licensing authority, the successor of the Traffic Commissioner, who dealt with applications for road service licences under the Act of 1930. They obtained route approval, and they therefore started running their omnibuses over this route in February, 1948. The question is: are they entitled to do so?

The Act of 1947 according to popular language "nationalized" the railways, and also brought certain other transport undertakings and services under public control. Section 1 of the Act created a public authority known as the British Transport Commission, which was the controlling authority responsible for the various public transport services by rail, road and water in Great Britain covered by the Act. For the purpose of carrying out the duties imposed on the Commission, the Act also created or provided for the creation of a number of subordinate public authorities, and one of those subordinate public authorities is the London Transport Executive, the defendants in this action. Speaking quite broadly, I think there can be no doubt that the London Transport Executive was intended to be the successor for practical purposes of the old London Passenger Transport Board in the area covered by the activities of the latter Board. The scheme of the Act in the case of those subordinate authorities was that the Transport Commission should delegate in a form and manner prescribed so much of the Commission's powers as was requisite to enable the subordinate authorities to carry on the delegated activities. Such an instrument of delegation has been executed in favour of the London Transport Executive and the defendants in this action are the London Transport Executive alone, the British Transport Commission not having been joined.

Two distinct questions were therefore raised in the action. First, were the powers conferred by the Act on the British Transport Commission sufficient to enable them to do what the London Transport Executive have done, that is to operate on this route as stage carriages the bus service in opposition to the plaintiff upon getting route approval, and without the obligation, previously necessary, of obtaining a road service licence? The second question is, assuming that the British Transport Commission were invested with the necessary powers, have they been effectively delegated to the London Transport Executive by the instrument of delegation? As to the first question, I think that the answer is plainly Yes. I think it is sufficient to look at s. 2 of the Act of 1947, which has been fairly and rightly described as being the "charter "or memorandum of association" of the British Transport Commission. The first paragraph of the section says: "Subject to the provisions of this Act, the Commission shall "have power—(*a*) to carry goods and passengers by rail, "road and inland waterway, within Great Britain." Further sub-sections were read, including sub-s. 3, which also appeared to give to the Commission wide general powers for carrying on, among other things, omnibus undertakings. In connexion with that it is, I think, useful to refer to s. 65, sub-s. 1, which is in these terms: "Sections 72 to 76 of the Road Traffic "Act, 1930, (which relate to road service licences) shall not "apply to any passenger road transport service provided, "whether under a scheme under the preceding provisions "of this Part of this Act or otherwise, by the Commission."

It was suggested in argument that the words "or "otherwise" should be in some way limited. The reference to a "scheme under the preceding provisions" of the Act is a reference to the power given by ss. 63 and 64 to the authorities created by the Act to obtain, in the form and by the manner stated, a scheme for the running of transport services over a specific area. It is admitted that in this case the provisions of those sections have not been invoked; but for my part I have been unable to see a good reason for limiting the words "or otherwise" so as to exclude any powers by which the Transport Commission provide a passenger road transport service including the general powers under s. 2.

A further argument which Sir Valentine Holmes pressed upon us was that upon a true reading of the Act, the only powers which the Commission should be treated as having, quoad the transfer to them of the undertaking of the London Passenger Transport Board, are the powers which are expressly vested in the Commission as transferee by the transfer provisions in s. 14. Sir Valentine bases his argument first on the opening words of s. 2 which are "Subject to the "provisions of this Act," and also on his analysis of the Act as a whole. I hope that he will excuse my not following him in detail through the whole Act, but the effect of it, he says is this: Part II of the Act covers railways, canals and other undertakings which are taken over by the express terms of the sections in that Part. Part III refers to the special case of road haulage, which we are not, of course, concerned with here. Then you get Part IV which includes ss. 63, 64 and 65 which are the sections directly related to passenger road transport services. Section 66 relates to ports, and again provision is made for them by way of schemes, and, finally, s. 70 and the following sections provide for working agreements as to coastal shipping. Sir Valentine says that upon the true construction of the scheme of the Act as a whole, you ought to treat the powers of the Commission not as being the general ones under s. 2, but as being the special ones provided in ss. 12 to 14 as regards transferred undertakings, and ss. 63 to 65 which relate exclusively to road passenger transport services. But, as I have indicated, I have come to the conclusion that it is not possible as a matter of construction to give such a very limiting effect to these opening words " Subject to the provisions of this Act," and I think, therefore, that it is reasonably clear that there is vested under those general powers in the Commission the necessary powers to carry on this particular road omnibus service. I would say by way of support, and the force of the point was conceded by Sir Valentine, that the fasciculus of sections with regard to coastal shipping opens with the words " Without prejudice " to any powers possessed by the Commission apart from the " provisions of this section," indicating clearly as regards coastal shipping that the powers of the Commission are not limited to the powers to make working agreements which are specifically referred to in those sections. I think, however, and this is perhaps of some importance, that the Commission's powers are not only those general powers which are conferred by s. 2, but include also special powers vested in the Commission by virtue, e.g., of ss. 12 to 14. I shall have to refer to those sections in a moment, but it follows, if I am right, that there are both the general and the special powers conferred upon the Commission, and of course to some extent, no doubt, therefore, there is a duplication.

I now come to the question which I have found much more difficult, at any rate much more difficult to express with any clearness, and that is the question, what was the effect of the instrument of delegation ? The document was executed on December 5, 1947, to come into operation on January 1, 1948. Before I refer to its terms I should, I think, just allude a little more specifically to ss. 12 and 14 of the Act to which I have already made some reference. Section 12 provided, as I have said, for the transfer to the Commission of the undertaking of the London Passenger Transport Board. Section 12, sub-s. 1, is : " Subject to the provisions of this " Act, the whole of the undertakings of the bodies of persons " specified in the Third Schedule . . . ."—that includes the London Passenger Transport Board—" shall, on the " 1st day of January, 1948, ... vest by virtue of this " Act in the Commission." Section 14, sub-s. 1, provides as follows : " The provisions of this section shall, subject " to the other provisions of this Act, have effect where, under " the preceding provisions of this Part of this Act,"—that is s. 12, sub-s. 1—" the whole of the undertaking of any body

" is to vest in the Commission," and sub-s. 2 provides that the property shall pass and become the property of the Commission, and so on.

I do not propose to go all through the details of the vesting provisions. Sub-section 3 has for present purposes this effect, that where there are agreements or like instruments to which the London Passenger Transport Board is a party, you must thenceforth read those agreements and instruments as though the party had been the British Transport Commission instead of the London Passenger Transport Board. Sub-section 4 says: " The provisions of the last preceding " sub-section . . . . shall apply in relation to any statutory " provision [and] . . . . any provision of any . . . . document not being an agreement, as they apply in relation " to an agreement to which the body "—and for this purpose that means the London Passenger Transport Board— " were a party, and, in relation to any such statutory . . . . " provision as aforesaid " certain references in the preceding sections are similarly applied. Then it says: " The statutory " provisions . . . . to which this sub-section applies include " statutory or other provisions passed or made after the " passing of this Act but before the date of transfer." In brief, by that sub-section, the statutory powers of the London Passenger Transport Board conferred by the express terms of the Act of 1933 passed to and became vested, so to speak, in the British Transport Commission, so that they have the statutory powers defined in the Act of 1933, just as the London Passenger Transport Board used to have them.

Section 14, sub-s. 6, para. (c), was also referred to in argument and it is convenient to mention it now. It provides that, notwithstanding anything in the section, " the Commission " shall not, by reason of the vesting, have any rights or powers " of the body as respects the borrowing of money or the " raising of money by the issue of securities, and the provisions " of sub-s. 3 and 4 of this section shall not apply to agreements, " statutory provisions " and so on in relation to borrowing money. It was said that this indicated that the general powers of the London Passenger Transport Board should be treated as vesting automatically by virtue of s. 12 rather than by the effect of sub-s. 4 of s. 14, but I do not myself read the paragraph as indicating such a result. Under the Act of 1933 the London Passenger Transport Board had special borrowing powers. It was obviously necessary that those should be

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preserved so long as the London Passenger Transport Board was alive, as otherwise it might have been said that the borrowings had become ultra vires. I treat this paragraph as indicating that the provisions I have read of s. 14, sub-s. 4, which transferred, so to speak, the special powers of the Board to the Commission, do not impose on the Board or put into the Board, the borrowing powers which the old Transport Board had.

I think therefore that it is true to say, as Sir Valentine said, that the mere vesting of the undertaking by s. 12 would not operate to transfer the Transport Board's statutory powers, but that it is necessary to refer to s. 14, sub-s. 4, to get that result as an effect of the vesting. The side-note is perhaps of interest on that view, for it does state " General effect of vesting " of undertakings." Sir Valentine was right when he pointed out that there is no express reference to powers in s. 12, whereas in other sections of the Act dealing with the acquisition of undertakings you do find express reference to the powers of the undertakings transferred; so that, whether or not in the absence of any other context the vesting of the undertaking would automatically vest in the powers, in this case my opinion is that the special powers vest and vest only by virtue of s. 14.

Of course, that raises the question, what were the powers? They were numerous and contained, as I have said, in the Act of 1933. I refer very briefly to four of those sections. Section 3 contained what is described as the general duty of the Board as to passenger transport, and it states that it was its general duty to provide an adequate and properly co-ordinated system of passenger transport within the London Passenger Transport area. Sub-section 3 gives, so to speak, general " charter " powers to the Board, and the first of them, para. (*a*), was: " Subject to the provisions of this Act, the " Board may in the exercise of their duty maintain, manage, " carry on, extend or improve their undertaking." Now the question, What is their undertaking? is answered by s. 5, which sets out, largely by reference to schedules, what were the existing undertakings which were taken over by the London Passenger Transport Board. They included very large numbers of omnibus undertakings, operating in various parts of London, including, of course, Metropolitan London itself, but also extending to other parts of the London Passenger Transport area.

Then there was a section which is of great importance in this case, s. 15. I must refer to that a little more in detail, because, as Sir Valentine pointed out, no reference is made by the learned judge in his judgment to this section or, what is more important, to the fact that the section was repealed in the Act of 1947. Section 15 provided that the Board was to have powers to provide road services of stage carriages (among other things) upon various roads, and, putting it quite briefly, it provided first that on roads within the London Passenger Transport area but outside the London Traffic area which was called the "special area," the Board could run these services subject to the obligation imposed by ss. 72 to 76 of the Act of 1930. So long as and to the extent that they kept within the special area, they were absolved from obtaining a road service licence. That is the effect of sub-s. 3, which provides that ss. 72 to 76 shall not apply to a road service provided by the Board wholly within such portion of the London Passenger Transport area as lies within the London Traffic area, "and in the case of a road service "provided by the Board partly within and partly without "the special area shall not apply to that service insofar "as it is within the special area." That sub-section had the effect therefore of relieving the London Passenger Transport Board from obligations which would otherwise have applied to them (albeit they were acting under their general powers) by virtue of the Act of 1930. But the section also went further, because it gave the Board power to go outside the London Passenger Transport area altogether, but (so far as relevant to this case) subject to the restriction that they should not both pick up and set down passengers outside the area.

Now, so far as this case is concerned, it was necessary, because the service in question was not one which was within the area to which the exemption applied, for the Board to ask for a road service licence, and though it was intra vires the Board to run their buses (if they got their licence) over the 400 yards of the route which lay outside the London Passenger Transport area, it was also as a result of this section impossible for the Board both to pick up passengers and to set them down on the 400 yards. Nevertheless, and I emphasize this because I shall come back to it in a moment, I think there is no doubt, upon its fair construction, that s. 15 is not a mere limiting section; it was an enabling section

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that gave to the Board powers which they would not otherwise have had, power to do things free from restrictions which would otherwise have applied, or power to do things which they could not otherwise do at all, albeit subject to the special restrictions specified in the section. I only refer in very brief terms to s. 16, but that was the section which, in effect, gave to the Board a monopoly within the special area. As I say, there were very many other powers of all kinds to which reference was made, but those to which I have referred will, I think, be sufficient to illustrate the point that I now want to deal with, the point which arises from this fact, that by virtue of s. 128 of the Act of 1947, a number of sections or sub-sections of the Act of 1933 were repealed, including all the sub-sections of s. 3 (except sub-s. 3) and s. 15. The effect of those repeals, as I construe the Act of 1947 was, that the powers which went to the Commission by virtue of sub-s. 4 of s. 14 were the residuary powers which the Board had under the Act of 1933 as amended by the repeals. And, for practical purposes, this means that so far as this case is concerned, the special powers of the Board which went over to the Commission were such that the Commission could not by virtue of these powers have run an omnibus service at all over the 400 yards which lie outside the London Passenger Transport area, because the only enabling power under the Act of 1933 was conferred by s. 15 which has been repealed. But, of course, the general power to run omnibuses within the London Passenger Transport area remains. This is the effect of the repeals on the powers conferred by the Act of 1933 which were transferred to or vested in the Commission by virtue of s. 14, sub-s. 4. Among those powers there were left, as I have indicated (and they must have been left for some purpose deliberately), sub-s. 3 of s. 3 (which gives the general right to run omnibuses within, as I construe it, the London Passenger Transport area), s. 5 (which described the undertaking of the London Passenger Transport Board) and s. 16 (which dealt with the monopoly position of the Board).

I now refer to the instrument of delegation. The first clause which must be read is 2, and as Jenkins L.J. pointed out during the course of the argument, that really is a recital. It defines what it is to which the scheme of delegation applies, and it says: "This Scheme applies to the following activities "of the Commission: (*a*) activities which the Commission "are empowered to carry on by virtue of the transfer to them

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" under Part II of the Act of the undertaking of the London " Passenger Transport Board "—that is a reference plainly to ss. 12 and 14 of the Act of 1947—" (*b*) activities which " the Commission are empowered to carry on by virtue only " of the powers conferred upon them by s. 2, sub-s. 1, of the " Act so far as those activities are carried on in connexion " with the activities referred to in sub-para. (*a*) of this " paragraph or are ancillary to such activities." The words " by virtue only " show that what that paragraph is referring to is powers which the Commission cannot show they derive from, ss. 12 and 14, but which are conferred only by virtue of the general, or what I call the " charter," provisions of s. 2.

Then comes the operative cl. 3, which is as follows: " Subject to the provisions of this scheme "—and for this purpose nothing turns on that—" the Commission hereby " delegate to the Executive "—that is the defendants— " the functions of the Commission in relation to their activities " set out in sub-paras. (a) and (b) of para. 2." Then there are some other words which I will refer to in a moment. Now, translating for this purpose the language of cl. 2 (*a*) of the instrument, the question seems to me to be this: is the operation of this omnibus route wholly or substantially something which the Commission is empowered to do by virtue of the transfer to it of the undertaking of the London Passenger Transport Board? I think the answer is substantially, Yes. I give that answer because as I construe sub-s. 4 of s. 14 of the Act of 1947, together with the amended Act of 1933, the effect of the transfer of the Board's undertaking was to give to the Commission the statutory powers of the Board to carry on their undertaking, to carry on, maintain and extend it (to use the words of s. 3, sub-s. 3, of the Act of 1933) within the London Passenger Transport area. Mr. Paull has argued that the effect of the repeal is to remove all the limitations which previously affected the London Passenger Transport Board, so that the Commission, as successors of the Board, can by virtue of the powers conferred by the Act of 1933, as amended by the repeals, carry on their operations anywhere in Great Britain as the Board could itself have done if there had been no vesting. Well, I reject that argument. It rests, as I follow it, upon the view that all the sections or sub-sections of the Act of 1933 which were repealed, including s. 15, were purely limiting sections. I do not take that view.

As I construe it, s. 15 was not a limiting section but an enabling section. It gave the Passenger Transport Board certain powers within the area, free from restrictions which might otherwise have applied to it, and powers subject to the restrictions specified in the Act outside the London Passenger Transport area altogether.

It might, I think, be possible to go further and say that the activities referred to in cl. 2 (*a*) of the deed are all the activities, that is all the functions and operations, which in the exercise of the general powers conferred upon the Commission by the Act of 1947, the Commission can perform in reference to the undertaking, including the omnibus undertaking, acquired from the London Passenger Transport Board. That construction would cover all operations over the whole of the road in question (inter alia), because such operations were in truth contemplated by s. 15 of the Act of 1933, albeit subject to restrictions, and the powers of s. 15 are for this purpose, it may be, preserved by sub-s. 3 of s. 2. On that view it would, I think, be unnecessary for the defendants to rely on s. 14 of the Act of 1947 at all, and it would be immaterial that s. 15 was in fact repealed. On this view, the repeal of s. 15 was necessitated or justified as a drafting matter so as to avoid conflict between the power which would have been expressly vested under s. 14, and the general powers of the Commission under the Act of 1947. It may well be that this view of the effect of the Act was the view in the minds of the parties to the instrument of delegation, having regard to the latter words in cl. 3 which are: "To the intent that, "subject as aforesaid, all the rights, powers and liabilities "of the Commission in connexion with those activities shall "be exercisable and dischargeable by the Executive." But for my part I prefer to rely upon the argument which I have tried earlier to express, that is that there was by virtue of sub-s. 4 of s. 14 of the Act of 1947 a transfer to the Commission of all the general statutory powers to carry on, inter alia, their omnibus activities within the London Passenger Transport area, which the London Passenger Transport Board had under the terms of the Act of 1933 as amended by the repeal, these general powers being, of course, subject to the general provisions of the Act of 1947, including particularly s. 65 of that Act.

If the view which I have expressed is right, then it would be true to say that the Commission are empowered to carry on the operation of a bus route over the whole of the road in question, save only the 400 yards or so which lie outside the London Passenger Transport area and that they have that power by virtue of, that is to say, as the statutory effect of, the transfer to the Commission under Part II of the Act of the undertaking of the London Passenger Transport Board.

As to the 400 yards to which I have alluded, it is to my mind reasonably clear that in the circumstances, the operation of the buses over those 400 yards is properly to be described as an activity carried on in connexion with the main activity which I have already described as falling within sub-para. (*a*) or ancillary to such activity. It is an operation, moreover, which the Commission would be empowered to carry on, not by virtue of any transfer of the old Passenger Transport Board's powers, but only by virtue of the general powers of the Commission under s. 2, sub-s. 1, of the Act of 1947. As to the last point, Sir Valentine Holmes urged that there was no evidence which would entitle the court to say that the 400 yards operations were properly speaking in connexion with or ancillary to the main operation of the bus route. On the particular facts of this case however I cannot accept that argument; I think they plainly were.

For those reasons, which I think are the same as those which influenced the learned judge, I come to the conclusion that the appeal fails. I have, I am afraid, stated it at rather greater length, but what I have been concerned to do is to deal particularly with the argument that Sir Valentine addressed to us based largely on the repeal of s. 15, and because it did not appear, as I thought, from Vaisey J.'s judgment that he had considered it. No doubt he had; but it was not in fact referred to in his judgment. I agree with the view he took and as I have said, the appeal, in my judgment, fails.

SOMERVELL L.J. I agree that the appeal fails and for the reasons which have been given by the Master of the Rolls, and I only wish to add very few words with regard to the repeal of s. 15 of the London Passenger Transport Act, 1933, and the effect of that repeal, if any, on the construction of the words in cl. 2 (*a*) of the instrument of delegation. The general scheme of this legislation in the light of the provisions to which reference has already been made (as from January 1, 1948, when the Act came into force), seems to me to be this: In the Act of 1947, general powers are conferred, some of which have been referred to, and restrictions and other administrative provisions which apply to the British Transport Commission as a new body set up under that Act. There also remain on the Statute Book, the Acts (in cases where there were Acts) which set up and provided for a number of undertakings including that of the London Passenger Transport Board which were vested in the Transport Commission under Part II of the Transport Act. In reading those Acts, by reason of s. 14, sub-s. 4, the British Transport Commission's name is substituted for that of the undertaking. In dealing therefore with matters which arise after the scheme has come into operation there is the main Act to look at, and also what is unrepealed of the special Act dealing with the transferred undertaking.

Now, in considering the effect of a repeal of a section it is necessary I think, to consider the nature of what is repealed. Let me give a simple example. Suppose one of the undertakings to be transferred had under its statute a power to engage in some activity, and assume that it had not already exercised the power but it had it and could exercise it at any time, and that that power was one which was not covered by s. 2 or by the general powers conferred on the British Transport Commission under the Act of 1947; if the section conferring that power was repealed it would of course be plain that Parliament did not intend the British Transport Commission to have the power which the transferred undertaking previously had to engage in that activity. It seems to me that the position is quite different when one considers the repeal of s. 15, having regard to what my Lord has already stressed and emphasized, the fact that s. 3, sub-s. 3, of the Act of 1933 has been left unrepealed. The effect of s. 14, sub-s. 4, of the Act of 1947, is to write in the British Transport Commission in the Act of 1933 in the places where under the Act you find references to the Board. If one looks at s. 15, sub-s. 1, it is seen that if it had been left unrepealed you would have had this provision: "Subject to the provisions of this "section it shall be lawful for the British Transport Commission "to provide road services of stage and express carriages on "any of the following roads but not otherwise," and you would at once have got a conflict, because there would be something on the statute book purporting to say that the British Transport Commission was restricted to the London Passenger Transport area and to such extensions of it as are covered by that section, whereas the Act of 1947 gives it powers over the whole country. When you come to what has already been read, s. 15, sub-s. 3, the references to ss. 72 to 76, as they are there applied to the Board, would be, as I read it, in conflict with s. 65 of the Transport Act of 1947.

It seems to me therefore that the problem that confronted the draftsman was this, and when you analyse it, it was a fairly simple one; s. 15 had become inapplicable, because in so far as it conferred powers, and it did confer powers, they already existed under the general powers conferred by the Transport Act, and in so far as it imposed restrictions, they were inapplicable as applied to the British Transport Commission as a whole, and therefore in the matter of drafting it seems to me clear that s. 15 had to go. But the fact that as a matter of drafting, the position had to be arranged in that way does not in my view, having regard to the fact that s. 3, sub-s. 3, was left on the statute book, in any way cut down the construction which ought to be given to the words that have been read in cl. 2 (*a*) of the scheme of delegation. The activities which the Commission are empowered to carry on by virtue of the transfer to them of the undertakings under Part II seem to me to be the activities which were previously carried on by the London Passenger Transport Board, and the scope of those words is not cut down by the fact that, for obvious drafting reasons, the power which the old London Passenger Transport Board had is merged in the greater power which the British Transport Commission has.

For those reasons, as well as those which my Lord has given, I agree that the appeal fails.

JENKINS L.J. I also agree. If literal justification is needed for the reference in the scheme of delegation to activities which the Commission are empowered to carry on by virtue of the transfer to them under Part II of the Act of the undertaking of the London Passenger Transport Board, for my part I think that such literal justification is to be found —though I may be alone in so thinking—in sub-s. 3, of s. 2, of the Act of 1947, which it will be remembered provides that "where, whether by agreement or otherwise, the "Commission acquire the whole or any part of any undertaking "of any other person, they may, subject to the provisions "of this Act, carry on any activities whether mentioned in "sub-s. 1 of this section or not, which were theretofore carried "on for the purposes of that undertaking or part of an "undertaking or were authorized by any statutory provision "to be carried on for the purposes thereof." It was argued by Sir Valentine Holmes that that sub-section had no application to undertakings acquired under the provisions of Part II of the Act itself, but was directed to cases of separate acquisitions which might thereafter take place. For my part, I see no ground for so limiting the operation of the sub-section, and if it applies, as I think it does, to one of the undertakings transferred under Part II, as for example the London Passenger Transport Board, then it seems to me to follow that, literally, the Act did empower the Commission to carry on any activities which the London Passenger Transport Board was authorized to carry on for the purposes of its undertaking "by virtue of the transfer" to the Commission of the undertaking of the London Passenger Transport Board.

I do not however feel it is necessary in this case to search the Act for precise verbal justification for the form of words used in the scheme of delegation. It is not open to doubt that the Commission, amongst many other powers, have power at all events to carry on all the activities which the London Passenger Transport Board could have carried on prior to the transfer, subject to various qualifications and exceptions which are not material for the present purpose; and the activities which the London Passenger Transport Board could have carried on undoubtedly included the running of a passenger service between Weston and Hitchin, subject, so far as the London Passenger Transport Board was concerned, to the necessity for getting a licence under the Act of 1930 in respect of the portion of the route which was outside the London Passenger Transport area, and subject also to the qualification or restriction in s. 15 of the Act of 1933 to the effect that they could not both pick up and set down a passenger on that part of the route.

The Commission are in a better position than the London Passenger Transport Board in that the Commission are absolved by s. 65 of the Act of 1947 from any necessity to obtain a licence, and are also free from any restriction as to picking up and setting down by virtue of the repeal of s. 15 of the Act of 1933, and of the general power given by s. 2, sub-s. 1 (*a*), of the Act of 1947 of carrying passengers by road within Great Britain. So one finds this position, that the

Commission have transferred to them the undertaking of the London Passenger Transport Board, amongst a great many other undertakings, and that they have full power to carry on the undertaking of the London Passenger Transport Board, and all the powers necessary to enable them to do everything that the London Passenger Transport Board could have done. The whole aim and object of the Act, when one looks at it, is to enable the central authority which is set up to carry on the acquired undertakings as heretofore, and to extend them.

Looking at the scheme of delegation against that background, one finds that the Commission, having powers such as I have described, and having, admittedly, power to delegate their functions, purport to delegate certain of their functions which they define as functions in relation to activities which the Commission are empowered to carry on by virtue of the transfer to them under Part II of the Act of the undertaking of the London Passenger Transport Board. For my part, I should have thought it reasonably plain that the intention of the scheme of delegation was to give the new London Transport Executive power to do everything (within the powers of the Commission themselves) that the old London Passenger Transport Board had power to do before the transfer. That I think is no doubt what was intended, but the appellant's argument is in effect that if one puts a strict literal construction on the formula used in the scheme to define the activities in question, and then goes to the Act with that strict literal construction in mind, one finds that the scheme of delegation is a mere nullity, a brutum fulmen, because there are no such activities of the Commission as are described in the scheme of delegation. Apart from s. 2, sub-s. 3, of the Act of 1947, and the other answers to this argument stated by my Lords, I think it involves a wrong method of approach; for this case, in the last resort, once the question of ultra vires is out of the way, is, I think, a case which turns on the true construction of the scheme of delegation read in conjunction with the Act. The scheme must be applied to the Act and the court must see whether looking at the Act, the language used in the scheme sufficiently identifies the particular activities to which the delegation is intended to relate. Of course, if, having gone through the Act, the court found it impossible to identify the activities meant, then the result might be that the scheme failed, but that would happen, or ought to happen, only if identification was impossible.

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Looking at the Act as a whole, I find it reasonably plain that the activities to which it was intended to refer in the scheme of delegation were the activities which the old London Passenger Transport Board had power to carry on before the transfer, and that for the purposes of the scheme, the Commission's powers to carry on these activities are treated, and, quite reasonably treated in my judgment, as powers derived by the Commission from the old London Passenger Transport Board, the activities in question being accordingly described as activities which the Commission are empowered to carry on by virtue of the transfer. I find no difficulty as a matter of construction, reading the scheme and the Act together, in identifying the activities referred to in the scheme in the way I have stated. The result of that is, I think, having regard not only to cl. 2 (*a*) but also to cl. 2 (*b*) of the scheme that the powers delegated by the scheme include power to run a passenger transport service on the route between Weston and Hitchin, including, I think, by virtue of cl. 2 (*b*) power both to pick up and set down passengers on the yellow and white road.

For these reasons, in addition to those stated by my Lords, I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Mawby, Barrie and Letts*; *Stephen G. Jones.*

Applied. KITCHEN'S TRUSTEE *v.* MADDERS [1950] 1 Ch. 134

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY *v.* EMERSON AND ANOTHER.

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Evershed M.R., Somervell and Jenkins L.JJ.

Mortgage—Statutory power of leasing excluded—Mortgagor purports to grant tenancy—Right of mortgagee to possession as against tenant—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 99, *sub-s.* 1.

Landlord and tenant—Rent restriction—Tenancy granted by mortgagor—Tenancy not binding on mortgagee—Mortgagee not landlord of tenant—Tenant not protected—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*) *and* (*g*)*—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sch.* 1.

The first defendant purchased a dwelling-house in 1946 which he charged by way of legal mortgage to the plaintiff building society. Notwithstanding the fact that this mortgage contained an express provision excluding his statutory power of leasing under s. 99, sub-s. 1, of the Law of Property Act, 1925, the mortgagor granted a weekly tenancy of the premises to the second defendant. The mortgagor having defaulted in the instalments payable under the mortgage, the mortgagees started proceedings by originating summons for delivery up of possession of the premises. The second defendant, the tenant, resisted the claim for possession on the ground that he was entitled to the protection of the Rent Restriction Acts. Vaisey J. held that the second defendant was lawfully in possession to an extent sufficient to justify his claim to be a tenant entitled to the protection of the Rent Restriction Acts.

Held, allowing that appeal, (1.) that, notwithstanding the fact that the mortgagor's statutory power of leasing conferred by s. 99, sub-s. 1, of the Law of Property Act, 1925, had been expressly excluded, the tenancy granted by the mortgagor to the second defendant had conferred on the second defendant a precarious title good as between himself and the mortgagor but liable to be defeated by the assertion by the mortgagees of their paramount title. *Iron Trades Employers Insurance Association Ld.* v. *Union Land and House Investors Ld.* [1937] Ch. 313 considered, and the observations of Lord Selborne L.C. in *Corbett* v. *Plowden* (1884) 25 Ch. D. 678, 681, applied. (2.) that the second defendant was not a tenant entitled to the benefit of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. No contractual relationship could be found or imported between the plaintiffs as mortgagees on the one hand and the second defendant as tenant on the other hand. The plaintiffs were not the "landlords" of the second defendant within the definition of landlord in s. 12, sub-s. 1 (*f*) and (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The plaintiffs accordingly by virtue of their paramount title were entitled to resist the claim of the second defendant to protection under the Act, and were entitled to possession of the premises. *Martin* v. *Watson* [1919] 2 I. R. 332, considered and not followed.

The question whether, if the second defendant had been the statutory tenant and not the contractual tenant of the mortgagor when the proceedings for possession were taken, that statutory tenancy would have been good as against the plaintiffs as mortgagees considered but not decided.

APPEAL from Vaisey J. (1)

In 1946 the first defendant, Edward Emerson, agreed to purchase a dwelling-house, No. 35 Pargeter Street, Walsall, which was subject to the provisions of the Rent Restriction Acts. Immediately on completion of the purchase the first defendant charged the premises by way of legal mortgage to the plaintiffs the Dudley and District Benefit Society,

(1) [1949] W. N. 138.

to secure the principal sum of 1,020*l.* and interest. This mortgage provided that the principal and interest should be repaid by weekly instalments of 1*l.* 14*s.* 0*d.*, and (by cl. 7) that "s. 93 and s. 99, sub-s. 1, of the Law of Property Act, "1925, shall not apply to this mortgage." The mortgage also contained a provision that at any time before the mortgage should have been discharged the society might enter into receipt of the rents and profits of the premises; but this power was subject to the proviso that it was not to be exercised unless and until there should have been default for three lunar months in payment of any of the instalments due thereunder.

It was alleged that this mortgage was granted on the understanding that the mortgagor, Emerson, would personally occupy the premises. It contained, however, no provision to this effect; and the first defendant in fact never went into possession but immediately granted a weekly tenancy of the premises to the second defendant, Fred Goodlad, who went into possession and had remained in possession ever since.

The mortgagor being in arrear with ninety-one instalments due under the mortgage, the society started this action by originating summons under R. S. C. Or. 55, r. 5A, for delivery up of possession of the mortgaged premises. The mortgagor Emerson did not enter an appearance. The second defendant defended the proceedings claiming to be a tenant entitled to the protection of the Rent Restriction Acts.

Vaisey J. dismissed the summons on the ground that the second defendant, Goodlad, was lawfully in possession of the premises to an extent sufficient to justify his claim to protection under the Act.

The Society appealed.

Milner Holland K.C., *John Mills* and *L. A. Blundell* for the appellants, the mortgagee building society. It would be surprising if a mortgagor, who has no power as against his mortgagee to create a lease, should have power to create a tenancy which would preclude the mortgagee from obtaining possession. It is submitted that the test to be applied is whether the letting to the second defendant was a lawful letting. It is not every letting which is protected by the Rent Restriction Acts. For example, if a trespasser went into possession and purported to grant a tenancy, the true owner must be entitled to evict a tenant

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claiming under such a purported tenancy. It cannot be said that these premises were not let as between the mortgagor, Emerson, and the tenant, Goodlad, but the mortgagees are entitled to say that as between themselves and the tenant the premises are not let. Section 3 and sch. I. to the Act of 1933 deal only with the case where the relationship of landlord and tenant exists. For the Rent Restriction Acts to apply to a dwelling-house there must be a letting as between the plaintiff and the tenant. The purpose of the Act is to give tenants protection against their "landlords" as defined in s. 12, sub-s. 1 (*f*) and (*g*), of the Act of 1920 (1). Here the mortgagees were never the landlords of the tenant within that definition and accordingly the Acts do not apply. The tenant was as against the mortgagees a trespasser and the mortgagees claim possession not as landlords but as owners. Farwell J. held in *Iron Trades Employers Insurance Association Ld.* v. *Union Land and House Investors Ld.* (2) that a lease granted by a mortgagor in breach of his covenant not to lease did not bind the mortgagee.

Heathcote-Williams K.C. and *Dennis Smith* for the respondent, the tenant, Goodlad. The tenant obtained a good but defeasible title. In *Remon* v. *City of London Real Property Co. Ld.* (3) Scrutton L.J. considered the meaning of the word "tenant" in these Acts. That decision shows that "landlord" and "tenant" must not be regarded exclusively as referring to a contractual relationship. There is a distinction between an estate which is not binding and one which is defeasible. It is conceded that the mortgagor in granting a tenancy could only grant a tenancy defeasible by the mortgagees in certain events. It is submitted: (1.) that, apart from the prohibition in the mortgage on the exercise of the mortgagor's statutory power of leasing and apart from s. 99, sub-s. 1, of the Law of

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(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1: "For "the purposes of this Act, except "where the context otherwise "requires: . . . . (*f*) the expres- "sions 'landlord' 'tenant,' "'mortgagee,' and 'mortgagor' "include any person from time "to time deriving title under "the original landlord, tenant, "mortgagee, or mortgagor; "(*g*) The expression 'landlord' "also includes in relation to any "dwelling-house any person "other than the tenant, who is "or would but for this Act be "entitled to possession of the "dwelling-house, and the "expressions 'tenant and "'tenancy' include sub-tenant "and sub-tenancy . . . ."

(2) [1937] Ch. 313.

(3) [1921] 1 K. B. 49.

Property Act, 1925, a mortgagor can confer on a tenant an exclusive right to possession of the mortgaged land provided that when the mortgagor lets the tenant into possession the mortgagee has not asserted his paramount right to possession. The authorities shew that in such circumstances the mortgagor executes a valid lease: see *Casborne* v. *Scarfe* (1) approved in *In re Sir Thomas Spencer Wells* (2). [He also referred to *Tarn* v. *Turner* (3).] (2.) That the definition in s. 12, sub-s. 1 (*g*), of the Act of 1920 of "landlord" is intended to include persons other than those deriving title under the original landlord. Further, it is to be observed that under the terms of the legal charge the mortgagees could not have entered into possession for three months after the mortgagor had defaulted. The tenancy granted by the mortgagor was accordingly not defeasible for that period. It is admitted that if the mortgagor had served notice to quit on the tenant, he would have become a statutory tenant of the mortgagor. In that event it would have been impossible for the mortgagees to have obtained possession against the tenant as the Acts operate in rem. Once the status of a statutory tenant is obtained it is good against the whole world, it is not limited to the actual landlord.

Milner Holland K.C. in reply. The definition of landlord in para. (*g*) of sub-s. 1 of s. 12 extends to include persons deriving title under the original landlord. However, that definition does not extend to include any person who grants a tenancy. It is limited to persons deriving title under the original landlord. It does not include persons having a paramount title. The respondent goes too far when he argues "once a statutory tenant always a statutory tenant." A tenant resisting a claim for possession must show that he is a person to whom s. 3 applies.

EVERSHED M.R. The case is not by any means, in my view, free from serious difficulty, and it is perhaps surprising that there has been no similar case before the court since the rent restriction legislation first operated; for the point, put in its briefest form, is this: Can a person in occupation of premises within the monetary limits prescribed by the Act, by virtue of a contract of tenancy between himself and a mortgagor, claim the protection of those Acts against a mortgagee claiming to assert his rights as mortgagee, where by the terms of the mortgage s. 99, sub-s. 1, of the Law of Property Act, 1925, has been expressly excluded? Vaisey J. came to the conclusion that such a tenant could so claim protection, and it is with natural diffidence that I find I have reached a different conclusion. The reasons for my differing from the learned judge I will try to state, but it may be that this is a case in which there is a lacuna in the legislation. Whether Parliament did or did not intend to protect the tenants of mortgagors against eviction by title paramount is, of course, a matter on which I can express no opinion. If I am right, and they did so intend, then Parliament has not been successful in achieving its intention.

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(1) (1737) 1 Atk. 603.
(2) [1933] Ch. 29.
(3) (1888) 39 Ch. D. 456.

The facts can be most briefly stated: The property is at Walsall, and the mortgage was made in December, 1946. It was said that the mortgage was upon the understanding, which I interpret as meaning made in the belief, on the part of the plaintiffs, that the first defendant, Emerson, would personally occupy the premises. But as the understanding did not form part of the transaction I make no further reference to it. The first defendant, the mortgagor, does not seem to have been a very satisfactory mortgagor, for at the time of the proceedings being started in November, 1948—less than two years after the mortgage—no less than ninety-one weekly instalments were in arrear. Those weekly instalments were 1*l*. 14*s*. 0*d*., and it may be some reason for their being in arrear that Emerson had proceeded to grant a tenancy to Fred Goodlad, the second defendant, at a rent of only 16*s*. 6*d*. per week. That again, however, is immaterial.

I must first of all refer to the mortgage to make clear how these points arise. It is, I think I may say, a building society mortgage in usual form providing for repayment by instalments. It is provided, and this is a matter on which Mr. Heathcote-Williams relied, that the society may do a number of things like entering into possession or receipt of the rents and profits, but subject to a proviso. The proviso (to cl. 4) is "that "the society shall not exercise the powers of entering into "possession letting or selling hereinbefore contained unless "and until the mortgagor shall have made default for three "lunar months in payment of some such instalment," etc. Of course, there is no question whatever that the three lunar months period had elapsed, but the purpose for which Mr. Heathcote-Williams relies on that will appear later.

Clause 7 of the deed provided that s. 99, sub-s. 1, of the Law of Property Act, 1925, should not apply.

The first thing that it is necessary to state is the effect of excluding that sub-section. Its terms are familiar: "A "mortgagor of land while in possession shall, as against every "incumbrancer, have power to make from time to time any "such lease of the mortgaged land, or any part thereof, as "is by this section authorized." Various conditions are imposed on the mortgagor's right to grant leases which will be effective and binding on persons entitled as mortgagees or through the mortgagees. I need not refer to the conditions. Sub-section 13 of s. 99 provides that the mortgage deed may by express terms exclude the privilege which s. 99, sub-s. 1, otherwise confers on the mortgagor. As I have stated, that privilege was excluded in this case.

What therefore is the effect, first in general, and secondly —and this is the main point—for the purposes of the Rent Acts, of a demise of the mortgaged property made by a mortgagor who, according to the terms of the mortgage, has no power to make a lease which will bind the mortgagee?

One of the cases cited before us, and referred to in the judgment of Vaisey J. is the decision of Farwell J. in *Iron Trades Employers' Insurance Association Ld.* v. *Union Land and House Investors Ld.* (1). That was a different case from the present in this respect, that the statutory power to grant leases was not excluded, but there was a covenant by the mortgagor that it would not be exercised, save on a condition. In effect, as the learned judge held, the parties had added to the statutory conditions of s. 99 a fresh contractual condition. In considering the case before him, the learned judge, who was, of course, very learned in the law of the land and relating to mortgages, used, among others, this phrase in that part of his judgment devoted to a somewhat similar point to that which I am now considering, namely, the effect of demises by mortgagors who are restricted in their powers to grant leases. The learned judge said (2): "Any lease granted "by him"—that is, the mortgagor—"to some third party "would be in no way binding on the mortgagee and as between "the lessee and the mortgagee would create no estate or "interest other than that which I will mention in a moment." That mentioned later is the right as a person interested in the equity of redemption to redeem the mortgage.

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(1) [1937] Ch. 313.

(2) Ibid. 317.

Mr. Heathcote-Williams was disposed to criticize somewhat the broad language that I have cited, and he referred us to a number of other cases designed to show that the power of a mortgagor, apart from the statutory power of s. 99 of the Act of 1925, is to create a lawful right to possession on the part of the tenant, to create in the tenant some title or interest which, as Mr. Heathcote-Williams put it, will be effective until, or unless, it is destroyed or defeated by the mortgagee ; in other words, that the mortgagor can create a defeasible interest by demise.

It will not be thought by Mr. Heathcote-Williams, I am sure, disrespectful to his argument if I do not refer to all the cases. I am content to take the language of Lord Selborne L.C. in the case of *Corbett* v. *Plowden* (1) : "If a "mortgagor," says the Lord Chancellor, "left in possession "grants a lease without the concurrence of the mortgagees "(and for this purpose it makes no difference whether it is "an equitable lease by an agreement under which possession "is taken, or a legal lease by actual demise) the lessee has a "precarious title, inasmuch as, although the lease is good "as between himself and the mortgagor who granted it, the "paramount title of the mortgagees may be asserted against "both of them."

I am content, for the purpose of the question which we have to consider, to take as the correct relevant statement the passage from Lord Selborne L.C.'s judgment which I have just read, and to assume, therefore, to borrow his language, that Mr. Goodlad, the tenant in this case, has a precarious title, good as between himself and the mortgagor Emerson, but liable to be defeated on the assertion by the mortgagee of his paramount title. Until that happens, Mr. Goodlad can remain lawfully in possession. It is quite plain that in the present proceedings the mortgagee is asserting his paramount title. He says : "There is here no contract which affects me in any "way whatever. I am not a party to the tenancy, and the "power which the Law of Property Act, 1925, would have "given to the mortgagor to make a contract binding on me "has been expressly and properly excluded. Put in another "way, the mortgagor here had not such an estate in himself "that he could confer upon Goodlad, the tenant, an interest "or estate in the land which is effective against my paramount "title. Nor has he, by statute or otherwise, conferred upon

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(1) (1884) 25 Ch. D. 678, 681.

"him the power to create in Goodlad such an estate or interest. "Therefore I, the mortgagee, am wholly unaffected by this "transaction of demise. Prima facie, therefore, I am a "person entitled, asserting my title paramount, to evict "Mr. Goodlad and claim possession."

Apart from the Rent Restriction Acts that, of course, would be a point which was not really capable of defence. But, it is said, the Rent Restriction Acts are designed to protect occupants of premises within the ambit of those Acts from eviction: the somewhat artificial results which the Acts can and do create are such as to justify the court, indeed to compel the court, to hold that, although s. 99, sub-s. 1, of the Law of Property Act, 1925, has been expressly excluded, yet the effect of the rent restriction legislation is to make this lease one which binds the mortgagee and affects his title paramount.

First of all, one must look at s. 12, sub-s. 2, of the Act of 1920, which enacts: "This Act shall apply to a house . . . . "let as a separate dwelling." It is said that this house was let as a separate dwelling; it was let by the mortgagor, Emerson, to Goodlad as a separate dwelling. Moreover, if it requires any qualification, it is sufficient to say that it was let lawfully. There was nothing unlawful in the letting, nor was it entirely nugatory, because, on the basis of the language I have referred to, it did operate to confer upon Goodlad such a right as Lord Selborne L.C. describes. But that is not the end of the matter. In considering to what class of cases the Acts are intended to apply, for what purposes, and between what persons, it is, I think, useful next to look at s. 3, sub-s. 1, of the Act of 1933; for if the second defendant, Goodlad, is entitled to succeed, it must be by virtue of reliance on that section: "No order or judgment for the "recovery of possession of any dwelling-house to which "the principal Acts apply or for the ejectment of a tenant "therefrom shall be made or given unless . . . ."—and then reference is made to the various circumstances in which the court can make an order. Mr. Heathcote-Williams points out that there is no reference in the main body of the Act, or in the sub-section which I have read, to the landlord, or to any particular person, or the person claiming the order. It is, he says, quite general in its terms, "No order . . . . shall "be made." But when you examine the terms of sch. I., I think it is quite plain that what the section and the schedule, which is read into it, must be taken to contemplate is a proceeding for possession against the tenant by somebody who may be fairly described—and I deliberately use that phrase for the moment—as a landlord. In other words, it appears to me that the general conception (which I of course entirely accept) that the Acts are designed to protect occupants of dwelling-houses within the Acts against eviction must be qualified to this extent—against eviction at the suit of persons who may fairly and properly be described as landlords of the occupants.

I will not take time to go in any detail through the terms of sch. I.; but the contents, to take one example, include breach by the tenant of obligations due under a contract, or its equivalent, to the person described as "landlord," the payment of rent, and so on. It seems, therefore, to me that looking, as I have to, at s. 3 and the schedule, and reading it, as I do, with s. 12 of the Act of 1920, the Act contemplates that the person against whom the occupant is to be protected is, as I have said, somebody who can be described as his landlord.

Pausing for a moment at that stage, and turning to the facts of this case, it will at once be seen that the description cannot be fairly, as I think, applied to the mortgagees in their claim against Goodlad. They are not his landlords; they never have been. The evidence makes it, I think, tolerably clear that they have never accepted his tenancy as one which binds them, and it is quite clear that there is no contractual relationship between Goodlad and the plaintiffs, either imported by the statute or otherwise.

But then Mr. Heathcote-Williams very properly draws attention to the definition in the definition section of "landlord." In sub-s. 1 (*f*) of s. 12 of the Act of 1920 it is stated: "The expression 'landlord' . . . . includes any person from "time to time deriving title under the original landlord"; but sub-para. (*g*) states: "The expression 'landlord' also "includes in relation to any dwelling-house any person, "other than the tenant, who is or would but for this Act "be entitled to possession of the dwelling-house." Mr. Heathcote-Williams says that there you have very wide terms, and you must treat this mortgagee as being within the ambit of the definition since he is in truth a person "who is or would "but for this Act be entitled to possession of the dwelling-"house." But it seems, at any rate to me, that there must be some limitation put on the words. To take the most extreme case, you could not apply them where the occupant is a squatter having no right or title, or alleging that he is the tenant of someone else who equally has no right or title. The argument is indeed a circular argument, for if the claimant to possession of property is to be regarded as a " landlord " for the purposes of the Acts, then you must first have decided that the occupant is protected by the Acts. When one comes to read together the definition in s. 12, sub-s. 1 (*g*), with s. 3 of the Act of 1933, and sch. I. to that Act, it is obvious that the gravest difficulties are going to be encountered if you are to give so wide a meaning to this phrase as Mr. Heathcote-Williams suggests. I think, without attempting any precise statement or definition of what is itself a definition, that the explanation may be found in this: the addition by para. (*g*) is no doubt an addition to a definition which extends " landlord " to persons deriving title under a landlord: in certain circumstances, to which I must presently refer, a sub-tenant is entitled to the protection of the Acts; there you would have a case in which a head lessor would be suing for possession against a sub-tenant, and the Act of 1920 makes provision by s. 5, sub-s. 5, and s. 15, sub-s. 3, for preserving the right to possession of a sub-tenant, and the sub-tenant becomes, or may become, the statutory tenant of the head landlord. Of course, in such a case as that, in construing the various provisions of the Acts, the landlord, quoad the sub-tenant, is a person not deriving title under that sub-tenant's landlord, but is a person whose title is superior to that sub-tenant's landlord. Furthermore, as I have already intimated, and as is, of course, well known, in certain circumstances (when, for example, an effective notice to quit has been given) the contractual tenancy between A and B may come to an end, and there then is created what is known as a statutory tenancy, B remaining in possession as a " statutory tenant " of A. It has been said in these courts that a statutory tenancy, as the phrase is commonly used, is a somewhat inapposite expression, for it confers on the so-called statutory tenant no estate or interest in the land. He cannot part with it or dispose of it, and in certain circumstances the right to possession, which is its principal feature, may pass to persons who would be quite different from the persons who would get the benefit of a contractual tenancy when a tenant dies. It would appear, therefore, more than possible that this addition to the definition in para. (*g*) was put in (and I think something would have had to be put in) to make the word " landlord " where a statutory tenancy has been created, apply in the relationship being then dealt with by the Act, between the person who would be entitled to possession apart from the Act and the statutory tenant. I, therefore, have come to the conclusion that this definition is not sufficient to give to the mortgagees in this case the right to describe themselves as the " landlord " for the purposes of this Act.

I am therefore thrown back, so to say, on the result which I derive from my consideration of s. 12 of the Act of 1920, and s. 3 and sch. I. to the Act of 1933. That is a result to this effect: that these mortgagees, asserting their title paramount, can properly resist the claim of the tenant to protection under the Act by denying, as they can deny, any contractual right which binds the mortgagees, or any estate or interest in the land in the tenant which affects the mortgagee's title.

The question has been debated whether the result would be the same if the mortgagor, Emerson, had determined the contractual tenancy, which he undoubtedly did create between himself and Goodlad, so that at any rate as between himself and Goodlad a statutory tenancy had arisen. I prefer for my part to express no view whether the result would be different if Goodlad could say: " My right to remain here is not by " virtue of any contract, or any estate which I derive from " Emerson, but is by virtue of the statutory right to possession " which, as between me and Emerson, the Act has conferred." Mr. Heathcote-Williams suggested that in that event the mortgagees could not succeed in ousting Goodlad, but I must not be taken to assent to that. As I have said, I find it unnecessary to decide it. It may be that there is an anomaly, but I am certainly not satisfied that, if there had been a statutory tenancy created in the way I have indicated, that that would have been necessarily sufficient to defeat the plaintiffs' rights.

I have, I hope, covered the main part of the argument, but there is one other matter which I think is instructive, to which I have made some reference, and it is this: special provision in the two sub-sections to which I have referred is made to protect the sub-tenant. I think that fact supports the view pressed on us by the present appellant, for if it were true to say that the existence of a tenancy lawfully created, or of a tenancy created in fact, binds, so to speak, the whole world, then though no doubt some provision might have to be inserted I do not think the provisions of s. 5, sub-s. 5, and s. 15, sub-s. 3, would have taken the form they have. It seems to me that those sub-sections are directed to providing in clear terms that although, were it not for those sub-sections, the title paramount of the superior landlord would prevail, yet Parliament is intending that that title should not prevail, but the right to possession of the sub-tenant should be preserved, and then goes on expressly to provide that thereafter there shall be deemed to come into existence a contractual relationship, which is carefully defined, between the sub-tenant and the head landlord. That last matter seems important to me, because if the tenant here is right, then you have somehow or other to argue, so far as I can see, that the Act has the effect of creating a contractual relationship of some kind between the mortgagees on the one hand and Goodlad on the other. Unless somehow or other implied, it is clear that no such contractual relationship exists. I think that if a person having title paramount, as these mortgagees have, was to be treated as a head landlord is, it would have been necessary to insert, and one would have expected there to be inserted, provision creating and defining the relationship. I add, further, that it seems to me that if this Act had intended so to affect the statutory power to exclude s. 99, sub-s. 1, of the Law of Property Act given by sub-s. 13 of that section, again I should have expected to find (in an Act dealing with a subject matter to some extent of the same kind, namely, the relationship of mortgagors and mortgagees, and landlords and tenants) some reference and provision accordingly.

One other case must be briefly alluded to, an Irish case of *Martin* v. *Watson* (1) because in the "Law Notes" book on these Acts (21st ed., p. 94), it is stated: "It has been held in "Ireland that the lessee of a mortgagor claims under him "and gets the benefit of the Act as against the mortgagee, "though the lease be void as against the mortgagee." We have been referred to that case and, like Vaisey J. I take the view that it does not establish that proposition, or at least does not establish that the protection given to the lessee is a protection not only against having the mortgage called in (which is what *Martin* v. *Watson* (1) decided), but also a

(1) [1919] 2 I. R. 332.

protection against eviction where the mortgagee is asserting his paramount title.

I should have referred earlier to this further point that Mr. Heathcote-Williams made, based upon the specific provisions of this mortgage; for he says that by the proviso to cl. 4, which I have read, the mortgagees could not in any event assert their title paramount until three lunar months had passed from the default of the mortgagor, and that, so to speak, renders far less precarious the title or interest conferred by the mortgagor, Emerson, on Goodlad. It no doubt does. But assuming the conditions which enable the mortgagee to assert his right do arise, then it seems to me that the position is in no way made different, because the mortgagee could not for a period assert them. It does not mean that because there is a period when the mortgagee cannot claim possession that, therefore, he is for all time bound by anything which may be done during that period. I therefore think that the special terms of this mortgage do not help Mr. Heathcote-Williams on the main point.

For the reasons which I have stated, I have ventured to express a view differing from that of the learned judge. It is plain, I think, that Vaisey J. found the matter one of difficulty, but the real basis of his conclusion rests, I think, on the answer he gave to the question he put to himself: "I have said this case in my judgment depends on whether "at the relevant time the possession of the second defendant "was lawful." He came to the conclusion, and I agree with him, that the possession was lawful in the sense that there was nothing unlawful in the grant by the mortgagor to the tenant of his tenancy. The mortgagee could not have prevented it and had nothing whatever to do with it; but it was still not binding on the mortgagee. It was a matter effective only between the parties to the particular contract. Therefore, I have come to the conclusion that it is not sufficient to say that the lease was lawful in the sense that it was not an infringement of some covenant between mortgagee and mortgagor, or was not otherwise unlawful in the sense that it was contrary to some statutory provision. I agree that it is necessary to determine the character of the tenancy at the time when proceedings are started, and one must, therefore, ask at that time, what is the nature of the tenancy. I am bound, I feel, to answer that, though it was a tenancy lawful and effective between the parties to it, it was ineffective in law against someone asserting, as the mortgagee was at that time asserting, a title paramount.

The point is a short one, and we have been much assisted by the careful argument on both sides, but, in the end, it is a matter of construing relatively few provisions of these Acts. I have, as I have indicated, come to the conclusion that the appeal should succeed, and that the plaintiff mortgagees are here entitled to possession, and are not prevented from obtaining it by the operation of the Act.

SOMERVELL L.J. I agree. It is unnecessary to read again, because the Master of the Rolls has just read it, s. 3 of the Act of 1933, which is the primary protecting section. In construing that section one must read it with sch. I. to which it refers. In every paragraph of that schedule one will find a reference either to the tenant or to the landlord, or to both. One must also, in my opinion, construe this section with all the other sections. Another relevant section to consider is s. 15 of the Act of 1920. Section 15, sub-s. 1, provides for what is to happen when a tenant has successfully asserted the right conferred on him by the Act. It is unnecessary to read it, but it provides, as is well known, that substantially the terms of what was previously a contract of tenancy shall govern the rights and obligations as between the parties. It therefore seems to me that the Act is primarily one which enables tenants to assert certain rights, and to remain in possession, as against landlords who are seeking to obtain possession, and who would, but for the provisions of these Acts, be entitled to possession. Mr. Goodlad said: "I am "a tenant. That is why I am here." "But," replied the mortgagee, "the transaction under which you became and "claim to be a tenant is not one which binds me"; and so far as the law is concerned, to which we have been referred—and Mr. Heathcote-Williams referred to a number of cases—I accept the two passages already cited by the Master of the Rolls from the decision of Farwell J. and the statement by Lord Selborne L.C. as sufficient for the purposes of this decision.

The question, therefore, as it seems to me, is whether Mr. Goodlad can assert the rights which the Acts confer on a tenant, as against mortgagees who are not bound by the contract of tenancy under which Mr. Goodlad became tenant, the mortgagees claiming by what is usually called a title paramount. Prima facie, it seems to me he cannot. It is against landlords, or persons who can be described as in the position of landlords, that the Acts are giving protection. But, of course, there may be provisions in the Act which displace that prima facie scope and ambit. Mr. Heathcote-Williams relies, and relies rightly, on the definition of "landlord" in s. 12, sub-s. 1 (*g*). I agree with what the Master of the Rolls said, that there must be some limitation on that definition. Some extension of the definition in para. (*f*) is necessary to meet the situation created by the extension of the benefits conferred by the Acts to sub-tenants. I am not quite sure whether the words of para. (*g*) are necessary to bring within the scope of the Act what I may call the statutory landlords, because when we get to the expansion of the word "tenant" it is not thought necessary to use words which cover expressly a statutory tenant. It may be the position between what are called statutory landlords and statutory tenants was thought to be sufficiently covered without these words.

I also think it is clearly necessary that some words should be inserted in the definition in the Act having regard to the fact that in the latter part of this sub-section the word "tenant" is extended so as to include a widow and other members of the family who may be residing with a tenant who has died. For these reasons, therefore, I cannot accept the definition as by itself enabling a tenant to claim as against a mortgagee, who is in the position of the mortgagee in this case, the protection of the Acts. I think an express clause would be necessary to enable such an extension of the provisions of the Acts to be successfully asserted by someone in the position of Mr. Goodlad.

I am reinforced in that view by the argument which has been already stated by the Master of the Rolls with regard to s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1920, dealing with sub-tenants.

The learned judge thought that the issue here was whether the possession was lawful. I do not think that is the real issue. I think one reason why there is a difficulty in approaching the question in that way is to be found in the provision of s. 15, sub-s. 3. If all that it was necessary to do was to show that somebody was lawfully in the premises as a tenant, then, as it seems to me, the provisions to be found in s. 5, sub-s. 5, and s. 15, sub-s. 3, would be unnecessary. I therefore come to the conclusion that Mr. Goodlad cannot claim the protection which he seeks, and I can see arguments for the non-insertion of the special clause which would have been necessary if people in his position were to be protected. It may be there are arguments either way, but we are not concerned in this court with the weighing of one against the other.

The only other point on which I would like to add a word is this. It relates to the last argument of Mr. Heathcote-Williams. It was suggested, and I think probably rightly, that if the mortgagor in a case like this sought to get possession as against someone to whom he had let the mortgaged property in the circumstances which we are considering, that person, if the property was a dwelling-house separately let, could assert as against the mortgagor the benefits conferred by the Rent and Mortgage Restriction Acts, and, if he did so successfully, he would become a statutory tenant. It is unnecessary to decide what would be the position if a mortgagee, as against someone who had reached that position, sought to assert the right which the mortgagee is asserting in this case. All I want to say is that at the moment I do not myself feel that there would be any anomaly in coming to the same conclusion in those circumstances. Mr. Heathcote-Williams submitted that there would be an anomaly. I do not myself feel that there would. Therefore, that part of the argument did not affect me in the conclusion to which I have come with regard to the other points. For these reasons, I think that this appeal must be allowed.

JENKINS L.J. I also agree. In view of the full reasons given by my brethren I hope it will not be thought disrespectful to the learned judge from whom we are differing if I say that for those reasons I agree that the appeal should be allowed, without adding any further reasons of my own.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Marcy, Russell Cook & Co., for Hooper and Fairbairn, Dudley; Miller and Smiths, for C. L. Hodgkinson and Benton, Walsall, Stafford.*

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June 28, 29.

Evershed M.R., Somervell and Jenkins L.JJ.

ALLIANCE BUILDING SOCIETY *v.* VARMA.

Mortgage—Originating summons taken out by mortgagee for delivery of possession—Trespasser in occupation—Whether procedure by originating summons applicable—R. S. C. Or. 55, r. 5a.

The first defendant mortgaged a mansion house and lands to the plaintiff building society in 1945. The second defendant, who was in actual possession of the premises, had been tenant at will of the first defendant. Her tenancy having been duly determined by notice to quit, she had remained in possession as a trespasser. The plaintiffs took out an originating summons under R. S. C. Or. 55, r. 5A, claiming delivery of possession of the mortgaged premises. Romer J. dismissed the summons on the ground that he had no jurisdiction to make an order for possession under Or. 55, r. 5A, against a stranger in title to the mortgage.

Held, allowing the appeal, that Or. 55, r. 5A, entitled the court to make an order for delivery up of possession to the mortgagee against a person in occupation, even though that person was neither the mortgagor nor a person claiming to derive title under the mortgagor in the sense of having a right of redemption.

APPEAL from Romer J.

The first defendant, Devanchand Varma, in 1945 entered into an agreement to purchase a mansion house and house known as Warberry House, Bishopsdown Park, Tunbridge Wells. Before the purchase was completed the first defendant, with the vendor's consent, allowed the second defendant, Mrs. Madine Nicholaena Legat, to take possession of the mansion house. By conveyance dated September 28, 1945, the premises were duly conveyed to the first defendant, who on the same day mortgaged them to the plaintiffs, the Alliance Building Society. This mortgage was in the usual form and contained an attornment clause. When the first defendant arranged for the second defendant to be allowed to take possession of the mansion house, the intention was that the second defendant should take a lease of the premises. No lease was in fact ever executed and she continued in occupation of the premises as tenant at will. Subsequently that tenancy was duly determined by notice by the first defendant, and the second defendant thereafter remained in occupation as a trespasser.

In 1947 the first defendant left this country for Pakistan and failed to continue paying the instalments due to the plaintiffs under their mortgage. In 1948 the plaintiffs took

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out an originating summons under R. S. C. Or. 55, r. 5A, claiming delivery up of possession. Romer J. dismissed the summons on the ground that he had no jurisdiction to make an order for possession under Or. 55, r. 5A, against a stranger in title to the mortgage. The plaintiff building society appealed. Neither the first nor the second defendant entered an appearance to the summons.

Denys Buckley for the appellants. The question on this appeal is whether proceedings under R. S. C. Or. 55, r. 5A (1), will lie against a trespasser. Order 55, r. 5A, was amended in 1940 and the words "or by any other person in, or alleged to be "in, possession of the property" were then added. At the same time Or. 13, rr. 8 and 17, which deal with default in appearance and Or. 27, rr. 7 and 17, which deal with default in pleadings were also amended. The effect of these amendments is that when a mortgagee, who could proceed by originating summons under Or. 55, r. 5A, proceeds by writ, he cannot get judgment save by taking steps appropriate under Or. 55, r. 5A. These amendments were made in consequence of the proceedings in *Temperance Permanent Benefit Building Society* v. *Nevitt* (2). Before the amendments were made a mortgagee seeking to recover possession against a third person could proceed by writ without filing any evidence. In *Martins Bank Ld.* v. *Kavanagh* (3) the mortgagor was ordered to be added as a party in order to give him an opportunity to redeem. There is no reason why proceedings under Or. 55, r. 5A, should not be a satisfactory method of proceeding against a trespasser. If Or. 55, r. 5A, does not apply, then Or. 27, r. 17, also does not apply against a trespasser. Order 55, r. 5A, puts a trespasser in a better position than he would otherwise be in, as in proceedings under that rule a plaintiff is not entitled to sign judgment without filing evidence.

EVERSHED M.R. The question is whether it is competent for a plaintiff mortgagee to bring a proceeding of this kind under this order and to obtain an order for delivery up of possession against some stranger in title to the mortgage, against someone who is said to be merely a trespasser. If that is so, it does involve an appreciable departure from the older practice and procedure, and it may be said to deprive defendants of the older right to plead possession as such. On that ground the learned judge, Romer J., thought that the order was not one that he could make under this order, and dismissed the summons. It is from that dismissal that the present appeal comes.

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(1) R. S. C. Or. 55, r. 5A, provides: "Any mortgagee . . . . "entitled to or having property "subject to a legal or equitable "charge . . . . may take out as "of course an originating sum- "mons . . . . for such relief of "the nature or kind following ". . . . delivery of possession ". . . . to the mortgagee . . . . "by the mortgagor or person "having the property subject to "the charge or by any other "person in, or alleged to be in, "possession of the property. . . ."

(2) [1940] 3 All E. R. 237.

(3) [1948] W. N. 321.

The relevant words of r. 5A of Or. 55 are: "Any "mortgagee . . . . may take out as of course an originating "summons, returnable in the chambers of a judge of the "Chancery Division, for such relief of the nature or kind "following as may by the summons be specified, and as the "circumstances of the case require; that is to say"—and the material one is—"delivery of possession to the mortgagee "or person entitled to the charge by the mortgagor or person "having the property subject to the charge"—and then come the vital words which were added in the year 1940—"or by any other person in, or alleged to be in, possession "of the property." Now on the face of it, I confess, it would appear to me that those words, as a matter of ordinary language, must cover anybody who is in fact in, or is alleged to be in, possession of the property; unless you are to read the word "possession" as being confined in some way to a person deriving title under the mortgagor and entitled to legal possession as distinct from occupation. The amendment of the rule has a history, and I do not want to deal with it at too great length. Under two other orders, provision is made in the case of an action to recover possession of land for the plaintiff's right, in the one case in default of appearance and in the other case in default of defence, to obtain an order summarily for possession. The orders are Or. 13 and Or. 27. I only need to refer to one, because the only difference is that they relate, as I have said, to the two different classes of case. By Or. 13, r. 8 it is provided that: "In case no appearance shall "be entered in an action for the recovery of land, within the "time limited by the writ for appearance, or if an appearance "be entered but the defence be limited to part only, the "plaintiff shall be at liberty to enter a judgment that the "person whose title is asserted in the writ shall recover

" possession of the land, or of the part thereof to which the " defence does not apply, upon the production of a certificate " by the solicitor for the plaintiff or, in the case of a plaintiff " in person, of an affidavit that the action is not one to which " r. 17 of this order applies." And r. 17 is in these terms: " In any action in which the plaintiff is claiming any relief " of the nature or kind specified in Or. 55, r. 5A, no judgment " shall be entered in default of appearance without leave of " the court or a judge who may require the application for " leave to be supported by such evidence as might be required " if relief were being sought on originating summons under " Or. 55, r. 5A, and may require notice of such evidence to " be given to the defendant "—and then it goes on—" and " to such other person (if any) as the court or a judge may think " proper," and these last words which I have emphasized were also added in the year 1940.

These rules appear to me to create a code to this effect: that where a mortgagee could proceed under Or. 55, r. 5A, but in fact proceeds by writ, and there is no appearance or no defence to that writ, then the plaintiff cannot obtain summary judgment but is subject to having imposed upon him such terms as the court might think proper to impose in the way of evidence, giving notice, and so on, in a proceeding under Or. 55, r. 5A. If a certificate can be given that the matter could not have been litigated under Or. 55, r. 5A, then that limitation does not arise; and it is plain—and I should say that we have, through the courtesy of the learned registrar, been shown the papers in the case, or some of them—that the amendments to which I have referred, or rather some of them, and in particular the addition to Or. 55, r. 5A, followed upon a case in this court in the year 1940, of *Temperance Permanent Benefit Building Society* v. *Nevitt* (1), in which the full court, Lord Greene M.R. and five Lords Justices, were sitting. That was a case in which the mortgagee had issued proceedings by writ against the mortgagor's wife who was living on the premises, asserting that the wife was a mere trespasser and claiming possession against her. It was suggested that the certificate could be given because the wife was not a person covered by the language in Or. 55, r. 5A, as it then stood. The court regarded that application as an abuse of the process of the court, on the ground that it was quite manifest that the mortgagor's wife could not be regarded as a trespasser

(1) [1940] 3 All E. R. 237.

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and that she was quite plainly a person who was properly the possession of the mortgagor's own home, or in occupation of it. But there seems no doubt that it was in order to meet the possibility of writs being issued in similar cases where some person other than the mortgagor was in occupation, that the words to which I have alluded were added to Or. 55, r. 5A. We are not, of course, entitled to be influenced, in construing the words of the rule, by what may have been the intention, but, having expressed the view, which is the view I take, that the words in the rule do cover such a case as the present, it is perhaps some comfort to me, on the strength of the material we have been shown, that it is, at any rate, very likely that the rule as construed by me does give effect to the intention at the time.

Those matters and the case I have cited were not referred to before Romer J.; but, having had the advantage of looking at them, and having considered all those matters, my view is that this rule does, upon this fair meaning and notwithstanding the use of the word "possession" in lieu of "occupation," cover such a case as the present, and does entitle the court to make an order for delivery up of possession to the mortgagee against a person in occupation, even though that person is neither the mortgagor nor a person claiming to derive title under the mortgagor in the sense of having a right of redemption.

That being so, there only remains the question of the form of the order. I have stated that the second defendant is in possession, that is, occupation, of the mansion house. I think that the right order to make will be an order against the second defendant that she deliver up to the plaintiff possession of the premises described in the schedule to the summons, or such part thereof as she now occupies. As to the first defendant, as he is not in occupation of anything, no order is required against him, and the proper order, therefore, appears to be that the court does not think fit to make any other order on the summons save to give to the plaintiffs the right to add their costs of the summons and of the appeal to this court to their security.

SOMERVELL L.J. I agree. We have only a short note of what the learned judge said below, but it would appear that he proceeded on the basis that Or. 55, r. 5A, should not apply unless the person against whom possession was sought is claiming through the mortgagor. We have had the advantage

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Somervell L.J.

in this court of a much fuller argument, and I have come to the clear conclusion that the rule, as it now stands, cannot be so restricted. The only other point is with regard to the meaning of the words "deliver up possession," and I desire to add nothing to what the Master of the Rolls said on that point.

I would like to add this, that if the rule were limited in the way the learned judge suggested, the result would, I think, be inconvenient. I do not think anyone would get any greater protection, and it would result in this: that it might not be clear whether the procedure of the rule applied until the matter had been investigated to a considerable extent. It is always inconvenient if after an investigation, which a party may not have been in a position to make beforehand, he finds that he has started up the wrong road. For these reasons, I agree that the appeal should be allowed.

JENKINS L.J. I agree.

Appeal allowed.

Solicitors for the appellants: *Boxall and Boxall.*

B. A. B.

DANCKWERTS J.

1949

Aug. 3.

In re CYRIL WRIGHT (A BANKRUPT)

Ex parte JOSHUA LANDAU (A CREDITOR) *v.* THE TRUSTEE OF THE PROPERTY OF THE BANKRUPT

Landlord and tenant—Lease—Covenant by tenant not to assign without consent—"Tenant" expressed to include successors in title—Bankruptcy of tenant—Devolution of lease on trustee—Trustee a successor in title.

A covenant in a lease by a tenant (which term was expressed in the lease to include his successors in title) not to assign the lease without the written consent of the landlord, is binding on the trustee in bankruptcy of the tenant as the successor in title of the tenant notwithstanding that the property in the lease devolved on the trustee by operation of law.

Doe v. *Bevan* (1815) 3 M. & S. 353, distinguished: *In re Farrow's Bank Ld.* [1921] 2 Ch. 164, applied.

MOTION.

By a lease dated April 19, 1947, the applicant, J. Landau, demised to C. Wright a dwelling-house and shop known as 6 Walker's Court, Berwick Street, London, W.1, for a term of twenty-one years from March 25, 1947, at a progressive rent payable half-yearly in advance on March 25 and September 29 in every year. The parties were described in the lease as "Joshua Landau . . . . (hereinafter called the "'landlord' which expression shall where the context so "admits include the person for the time being entitled to the "reversion immediately expectant on the determination of "the term created) of the one part, and Cyril Wright . . . . "(hereinafter called the tenant which expression shall where "the context so admits include his successors in title) of the "other part." By cl. 2, sub-cl. 8 of the lease the tenant covenanted "not to assign underlet or part with the possession "of the demised premises or any part thereof without the "written consent of the landlord such consent not to be "unreasonably withheld in the case of a respectable and "responsible person." By cl. 4, sub-cl. 1, the lease provided that "If the rent hereby reserved or any part thereof shall "at any time be unpaid for twenty-one days after becoming "payable (whether formally demanded or not) or if the "covenants on the tenant's part herein contained shall not be "performed or observed or if the tenant shall become bankrupt "or make any assignment . . . . it shall be lawful for the "landlord at any time thereafter to re-enter upon the demised "premises or any part thereof in the name of the whole and "thereupon this demise shall absolutely determine but without "prejudice to the right of action of the landlord in respect of "any antecedent breach of the tenant's covenants herein contained." On January 20, 1949, the tenant was adjudicated bankrupt and the lease held by him became vested in the respondent as his trustee in bankruptcy. The respondent did not disclaim the lease. He paid rent for six months in advance which was due on March 24, 1949, and the applicant waived his right of re-entry by reason of the bankruptcy of the tenant. The respondent desired to assign the residue of the term granted by the lease to the tenant's wife. The applicant refused his consent to the assignment and on June 20, 1949, the respondent informed him that he intended to complete the assignment whether or no the applicant consented thereto, claiming that he was not bound by the terms of the covenant in the lease by the tenant not to assign without the consent of the landlord. By the motion, the applicant, inter alia, claimed, a declaration that the respondent was bound by the covenant not to assign the lease without the applicant's consent.

V. R. Aronson K.C. and *Muir Hunter* for the applicant. The question raised by the motion is whether the trustee in bankruptcy of the tenant is bound by the latter's covenant not to assign without the landlord's consent. It is submitted that he is so bound. It was held in *Doe* v. *Bevan* (1) that a restriction on assigning a lease was not broken by the assignment by operation of law taking place on a bankruptcy. But when *Doe* v. *Bevan* (1) was decided in 1815, the right of a trustee in bankruptcy to disclaim, which was first introduced in the Bankruptcy Act, 1869, did not exist, nor did the provisions of the Landlord and Tenant Act, 1927, with regard to restrictions on assignment. Further in *Doe* v. *Bevan* (1) the assignees had been ordered by the court to take possession of the lease and to sell it. It was, therefore, only by putting a strained construction on the word "assign" that the assignees could be protected from personal liability. As the trustee can now disclaim an onerous lease, the reason for that construction no longer exists, and it would be unjust if the trustee should have the power to saddle the landlord with an undesirable tenant. The construction placed on the word "assign" in *Doe* v. *Bevan* (1) was criticized by Younger L.J. in *In re Farrow's Bank, Ld.* (2) and in Williams on Bankruptcy 16th ed., 292, while it has never been applied in companies winding up (*In re Birkbeck Permanent Benefit Building Society* (3), *Cohen and Another* v. *Popular Restaurants, Ltd.* (4). In the present case the trustee attorned tenant to the landlord by paying rent for a substantial period and thus became a contractual tenant, bound by the covenants in the lease, as was the case in *Dyke* v. *Taylor* (5). The words used in the lease are "successors in title" and not "assigns" and even if the court were bound by the old cases to put a forced construction on the word "assigns," there is no reason for doing so in the case of the expression "successors in title." The trustee in bankruptcy was clearly the successor in title of the bankrupt and, as such, is expressly bound by all covenants running with the land.

(1) (1815) 3 M. & S. 353.
(2) [1922] 2 Ch. 164.
(3) [1913] 2 Ch. 34.
(4) [1917] 1 K. B. 480.
(5) (1860) 2 Giff. 566.

Leonard Caplan for the respondent. The trustee is not bound by the covenant not to assign without consent.

[DANCKWERTS J. Why is he not a successor in title of the tenant and so bound by the covenant ?]

It is submitted that *Doe* v. *Bevan* (1) and similar cases are still good law and apply in the present instance. It is important to observe that that case, and even older cases, do not turn simply on the point that the word " assign " in the covenant was held not to include an assignee by operation of law. The real basis of the old decisions, which still stands, is that as the trustee takes under a statutory obligation to dispose of the bankrupt tenant's interest to the best advantage of the creditors, that statutory obligation overrides and supersedes any obligations arrived at inter partes. The argument put forward on behalf of the applicant was relied on without success in *Hopkinson* v. *Lovering* (2) where, it was contended that the Bankruptcy Act, 1869, provided a wholly new code for the guidance of a trustee in bankruptcy. It is submitted that whether the words of the covenant are " assigns " or " successors in title " the same principles apply and the trustee is not subject to the covenant. In *In re Johnson and Stephens, ex parte Blackett* (3) it was held that " a trustee in bankruptcy " who sells leasehold property of the bankrupt that is subject " to a covenant not to assign without consent, and who does " not obtain the necessary consent, is not personally liable " under the covenant, though it extends to assigns by operation " of law." Vaughan Williams L.J. there said that any liability a trustee might have under a lease which included a covenant against assignment without consent, was extinguished by the trustee assigning, even although he had no consent from the lessor. In Halsbury's Laws of England, vol. 2 Hailsham ed., p. 204, para. 271, it is stated that "a proviso " for forfeiture of a term in the event of the lessee assigning his " interest without the assent of the lessor does not apply to " the bankruptcy of the lessee or to an assignment of the lease " by the lessee's trustee in bankruptcy, who is entitled to " assign the lease without the lessor's consent." (He also referred to *Goring* v. *Warner* (4).)

DANCKWERTS J. stated the facts and continued: There are a number of elderly, if not respectable, authorities on the question raised in the present case, one of the best known of which is *Doe* v. *Bevan* (1). It has long, I think, been accepted on the authority of that case that a trustee in bankruptcy is at liberty to assign a bankrupt's leasehold property notwithstanding a covenant that the tenant or his assigns shall not assign or part with the property in question. Mr. Aronson, on behalf of the landlord, claims that the reasons for that decision no longer apply at the present time because s. 56 of the Bankruptcy Act, 1869, contains statutory provisions, which appear in that Act and onwards, enabling a trustee in bankruptcy to get rid of an onerous lease by disclaimer; that provisions are made for the results which follow on such a disclaimer, and that, therefore, a trustee in bankruptcy is no longer in the position of finding himself involuntarily landed with an onerous lease and unable to dispose of it except by assignment to some other person. Mr. Aronson also claimed that the reasons for the decision in question no longer apply because of the passing of the Landlord and Tenant Act, 1927, which introduces into every covenant against assignment, a provision to the effect that consent to the assignment should not be unreasonably withheld in the case of respectable and responsible assignees. A third point taken by Mr. Aronson was that by reason of rent having been paid by the trustee in bankruptcy under the lease and the landlord having accepted him as tenant and having waived the condition of re-entry on bankruptcy, he ceased to be a mere person in possession by operation of law and had become a person in possession by privity of contract so that he became subject to the terms of the lease in all respects. For that he relied on *Dyke* v. *Taylor* (2) decided in 1860. I need not decide whether that case was rightly or wrongly decided. It seems to me that the present circumstances hardly come up to the circumstances which existed there, and, also, that it is not necessary for me to apply it in view of the decision at which I have arrived in the present case. I think that somewhat extraordinary results might follow if the decision in *Dyke* v. *Taylor* (2) were applied to the full. For instance, a trustee in bankruptcy, having parted with property in perfectly ordinary circumstances, and even with the landlord's consent, might be held to be liable for ever under the covenants of the lease notwithstanding that he had parted with the property. That seems to me to be a result which would be very extraordinary.

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(1) 3 M. & S. 353.
(2) (1883) 11 Q. B. D. 92.
(3) (1894) 1 Mans. 54.
(4) (1724) 2 Eq. Cas. Abr. 100.

I think the questions for my decision really come down to

(1) 3 M. & S. 353.

(1) 2 Giff. 566.

these: First of all, are cases such as *Doe* v. *Bevan* (1) to be treated as still good law? and secondly, do those cases apply to the particular facts of the present case? As I have said, Mr. Aronson asked me to decide that *Doe* v. *Bevan* (1) was no longer appropriate having regard to the present state of the law of bankruptcy. Mr. Caplan, for the trustee in bankruptcy, on the other hand, asked me to say that not only are those cases fully operative at the present time, but that they show that in all cases, by reason of the provisions of the law of bankruptcy, they remain fully operative and prevent any covenant against assignment from limiting the trustee's ability to assign a lease at all. The reasons for that, he said, were that the bankruptcy law imposes on the trustee in bankruptcy a duty to realize the property of the bankrupt for the benefit of his creditors, and that such statutory duty overrides all contractual provisions which might limit and prevent the proper realization of the property. I hope I have not put his argument too high, but that seems to me to be really the result which must follow if he is correct.

Doe v. *Bevan* (1) and the other cases are, in my opinion, explainable, apart from such a wide proposition as that which I have mentioned, by reference to the precise terms of the covenants in the particular cases concerned. For instance, in *Goring* v. *Warner* (2) the covenant was "that the lessee his "executors or administrators should not assign the term "without lessor's consent under his hand in writing, with "a power of re-entry in such case to the lessor . . . ." Of course, neither the commissioners under the authority of the statute referring to the strict distribution of property for the benefit of creditors, nor assignees from such commissioners, were within the express terms of such a covenant but Mr. Caplan is clearly justified in saying that the Lord Chancellor as reported "held clearly, that the assignment by the com-"missioners (being done by authority of a statute, which will "supersede any private agreement between even the parties) "and the assignment over by the assignees was no breach of "the condition; ergo decreed plaintiff to hold and enjoy, "and an injunction to stay proceedings at law." If that decision is applied literally and to the full, it does not matter what the terms of the covenant against assignment, and so on, are; the persons charged with the duty of distributing the bankrupt's property simply are not bound by it at all. In

(1) 3 M. & S. 353.

(2) 2 Eq. Cas. Abr. 100.

Doe v. *Bevan* (1) the covenant was that "the tenant, his "executors, administrators, or assigns, should not assign the "indenture, or his or their interest therein, or assign, set, or "underlet the messuage and premises, or any part thereof, "to any person or persons whatsoever, without the consent "in writing of the lessor." Although, in the decision of the court in that case, language is used by the judges which might be construed in a wide sense, it seems to me that the real basis of the decision is that involuntary assigns, such as a trustee in bankruptcy, or the commissioners for the purpose of distributing bankrupts' property, as it was in that actual case, are not assigns within the meaning of such a covenant and are, therefore, not prohibited from parting with or assigning the leasehold property in question. That decision has stood for a very long time and, if it is to be held no longer part of the law, must be so held, in my opinion, by the Court of Appeal.

The view which I take of the effect of the decision in *Doe* v. *Bevan* (1) seems to me to be supported by two more modern decisions, one of which is *In re Birkbeck Permanent Benefit Building Society* (2). That was a case where there was an exception in a prohibition of assignment of a policy of insurance, in the case of persons taking by operation of law. There, the property having been vested by an order of the court in a liquidator of a company—a somewhat unusual procedure—it was held that the liquidator took by operation of law, and, therefore, was not subject to the provisions of the restriction in question. In the course of his judgment Neville J. said:—"There is another point of view which I think equally affects "the condition of the insured, and it is this. *Doe* v. *Bevan* (1) "clearly shows that prima facie a contractual restriction of "assignment does not apply to the assignment by a person on "whom the property has devolved by operation of law, and "who is under an obligation to assign. Of course, you may "have so contracted as to include such a case, but the mere "condition against assignment does not prima facie include "it." That passage seems to me to be quite inconsistent with the wider view that there is some policy of the law of bankruptcy which prevents a trustee in bankruptcy from being bound by any condition or covenant against assignment.

The other case is the very well known case *In re Farrow's Bank, Ld.* (3) where it was held that in the ordinary case of a liquidator of a company in liquidation, as the property did not

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(1) 3 M. & S. 353.

(2) [1913] 2 Ch. 34, 38.

(3) [1921] 2 Ch. 164, 174, 175.

DANCKWERTS J.

1949

CYRIL WRIGHT (A BANKRUPT), *In re.* *Ex parte* JOSHUA LANDAU (A CREDITOR) *v.* THE TRUSTEE OF THE PROPERTY OF THE BANKRUPT.

vest in the liquidator without an order of the court, the liquidator could not assign the leasehold property of the company contrary to a covenant against assignment, for the simple reason that the property did not vest in the liquidator and it would be an assignment by the actual tenant, that is to say, the company. For my present purpose the material passage is in the judgment of Lord Sterndale M.R. where he is distinguishing the case of a liquidator from that of a trustee in bankruptcy. He said: "Now, as has been pointed out, "the position of the trustee in bankruptcy is quite different "from that of a liquidator. He does not act on behalf of the "bankrupt; he does not dispose of the bankrupt's property "as such; all the property is vested in him." Then he goes on to say: "The real question which arose in the bankruptcy "cases to which we have been referred may be stated in this "way. There was a covenant that the lessee should not "assign without the consent of the lessor, and that bound "him and his assigns. The trustee in bankruptcy had assigned "without the consent of the lessor. Was that an act of the "lessee or his assigns? It was not of course necessary to "hold that the assignment was not his act; that was obvious "on the face of it; and what was held was that the trustee in "bankruptcy was not the assign of the bankrupt within the "meaning of the covenant, because the covenant related only "to voluntary assigns and not to assigns in law. That is "really the basis of all those decisions, whatever may have "been the language used." Applying that to the present case, it seems to me that all that cases like *Doe* v. *Bevan* (1) have decided is that the trustee in bankruptcy is not an assign within the covenant that the lessee or his assigns shall not dispose of the property. In the present case the words are different. The covenant, reading it with the final clause at the beginning of the lease, is a covenant by the tenant and his successors in title not to assign, and so forth, without the landlord's consent. I am unable to see why a trustee in bankruptcy, even though he obtains the property by operation of law, is not a successor in title of the bankrupt, that is to say, the tenant. Therefore, in my view, the trustee in bankruptcy is bound by the terms of the covenant, and I am prepared to made a declaration accordingly.

Application granted.

Solicitors for the applicant: *Landau & Co.*
Solicitors for the respondent: *Stone & Stone.*

P. B. D.

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(1) 3 M. & S. 353.

In re TRUSTS AFFECTING COMPENSATION MONEYS IN RESPECT OF COAL HOLDINGS.

DANCKWERTS J.

PUBLIC TRUSTEE *v.* MANCHESTER CORPORATION.

1949

July 13, 21.

Mines and minerals—Compulsory acquisition—Compensation assessed and paid to Public Trustee—Apportionment and disposal of compensation—Numerous leases and underleases—Effect of failure to register particulars of ownership—Costs whether payable by National Coal Board—Coal (Registration of Ownership) Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 52), *s.* 1, *sub-s.* 1—*Coal Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 52), *ss.* 6, 7, 39; *sch. III*, *Part* 4, *paras.* 18 (*c*), 21, 22.

All the interests in the coal and mines comprised in a certain "holding" having become vested in the Coal Commission under the provisions of the Coal Act, 1938, the Commission, in exercise of their statutory powers, determined to pay compensation to the trustee appointed by them, namely, the Public Trustee. The holding consisted of numerous leases and under-leases granted without any exception of minerals, and the Public Trustee took out a summons to determine how the compensation money was to be distributed.

Held, that the fund was to be distributed as to 50 per cent. to the freeholder and, as to the remaining 50 per cent. among the lessees and under-lessees; but that the position as to the method of division between lessees and under-lessees must be reserved.

Held, also, that there was nothing in the relevant statutes to deprive lessees or under-lessees, who had failed to register particulars in accordance with the Coal (Registration of Ownership) Act, 1937, of their right to share in the compensation awarded.

Held, also, that the questions raised by the summons were not raised by way of adverse litigation, but rather for the purpose of construing the provisions of the Coal Acts and that the costs incurred so far in the present proceedings must be paid by the Coal Commission.

In re Duke of Leeds [1947] Ch. 525, referred to.

ADJOURNED SUMMONS.

By virtue of ss. 3 and 4 of the Coal Act, 1938, all the interests (other than retained interests) subsisting on July 1, 1942, in the coal and mines comprised in a "holding" became vested in the Coal Commission, subject as mentioned in s. 3, sub-s. 1, of the Act and compensation, ascertained in accordance with the provisions of s. 7 of the Act, became available for distribution by the Public Trustee—he being the trustee appointed on November 10, 1942, by the Coal

Commission to receive the compensation in trust to be applied by him in accordance with the provisions of para. 21 of sch. III to the Act.

The holding was, as regards the surface, divided into a large number of plots, the subject matter of numerous leases and under-leases, which are more fully referred to in the judgment. Some of the lessees and under-lessees had duly registered particulars as to their proprietary interests in accordance with the provisions of the Coal (Registration of Ownership) Act, 1937, and others had omitted to do so.

The Public Trustee took out a summons to determine—(1.) Whether (*a*) lessees of parts of the holding under leases granted without exception of mines and minerals and sub-lessees of parts of the holding under under-leases granted without the like exception were respectively entitled to share in the compensation, or (*b*) such lessees and under-lessees were not so entitled to share in the compensation and the whole thereof ought to be held and disposed of by the Public Trustee on the footing that such lessees and under-lessees had no interest in the holding; (2.) If question (1.) (*a*) were answered affirmatively, that directions might be given as to the mode or principle of apportionment; and (3.) whether any of the lessees or under-lessees who had failed to register under the Coal (Registration of Ownership) Act, 1937, were, in consequence of their failure to do so, disentitled to any compensation; and (4.) that consequential inquiries might be directed.

Hubert A. Rose for the plaintiff.

Wilfrid M. Hunt for the Manchester Corporation (lessees and sub-lessees of part of the holding, who had registered).

Wigglesworth for a lessee who had failed to register.

Cope Morgan K.C. and *Scarman* for Sir Oswald Mosley (the tenant of the fee simple of the holding).

C. A. J. Bonner for the National Coal Board.

Cur. adv. vult.

July 21. DANCKWERTS J. delivered the following written judgment: The questions raised by the originating summons relate to the proper distribution of the compensation awarded under the provisions of the Coal Act, 1938, in respect of a "holding," as defined by the Coal (Registration of Ownership)

Act, 1937, and the Coal Act, 1938. The coal in question is under the surface of parts of the City of Manchester known as Collyhurst, Ancoats and Beswick, and the amount of the compensation is nearly 14,000*l*. It is held by the Public Trustee as trustee of the sum in question by virtue of an appointment made by the Coal Commission on November 10, 1942, in pursuance of powers conferred by Part IV of sch. III to the Coal Act, 1938.

The material date is January 1, 1939, which is referred to in the Coal Act, 1938, as the "valuation date." The third defendant, Sir Oswald Mosley, claims to be tenant in fee simple of the holding which is the subject of the compensation. The first defendants, the Lord Mayor, Aldermen and Citizens of the City of Manchester, are lessees of some parts and under-lessees of other parts of the holding, and the defendant Mrs. Septima Holcroft Shawe is a lessee or under-lessee of other parts of the holding. The distinction between the Corporation of Manchester and Mrs. Shawe is that Mrs. Shawe did not register particulars under the Coal (Registration of Ownership) Act, 1937, but the Corporation of Manchester did register such particulars.

The material leases were granted by the predecessors of Sir Oswald Mosley between the years 1811 and 1880 without any exception of minerals and so the interest of Sir Oswald Mosley in the minerals in or under the surface of the property included in the leases passed to the lessees for the duration of the leasehold terms, which were for 999 years or in some cases for 9,999 years, at comparatively small rents. Certain mining leases of the holding or parts of it were granted by Sir Oswald Mosley or his predecessors. On October 21, 1740, a mining lease was granted in respect of the Collyhurst, Ancoats and Beswick areas for a term of 200 years. On February 16, 1909, a fresh lease was granted of the same properties for the period which remained unexpired of the same term. This term of years was, therefore, due to expire in October, 1940. On February 17, 1927, a mining lease for forty years was granted in respect of the Ancoats and Beswick areas only. The 1909 lease restricted the rights of the mining lessees to let down the surface more severely than the 1740 lease did. I mention this because Mr. Cope Morgan based an argument which he put forward on behalf of Sir Oswald Mosley on the submission that the mining lessees were not entitled to let down the surface. The matter

DANCKWERTS J.

1949

Trusts affecting Compensation Moneys in respect of Coal Holdings, *In re.* Public Trustee *v.* Manchester Corporation.

is complicated by the fact that the surface is now covered with houses and is divided into some 500 plots and in many cases the present owners of the plots have not, so far, been ascertained.

Section 1 of the Coal Act, 1938, constituted the Coal Commission as a body corporate, and the Coal Commission are defendants in view of their possible liability for the costs of these proceedings. Under s. 3 of the Act the Coal Commission were to acquire the fee simple in all coal and mines of coal and other property and rights mentioned and on the vesting date (which was July 1, 1942) all coal and mines of coal as existing at that date were to vest in the Commission "for a title comprising all interests then subsisting in any "such coal or mine other than retained interests" (which last are interests in coal or a mine of coal that arise under a coal-mining lease and are provided for by s. 5).

By s. 3, sub-s. 2, during the intervening period between January 1, 1939, (the valuation date) and July 1, 1942, (the vesting date) the coal and mines of coal are to be held as if all the existing owners thereof had, in respect of all their interests therein other than retained interests and with full capacity so to do, entered into a contract on the valuation date for the sale thereof to the Commission at a price to be ascertained by valuation, with provision for completion of the contract on the vesting date. The compensation is provided for by s. 6. It is an aggregate amount of 66,450,000*l.*, which is to be divided proportionately to the aggregate value of the coal hereditaments in each region between the "valuation "regions" into which Great Britain was to be divided. The sums reached by such division were to be divided between the units comprised in each region which are described as "holdings." The sum which is the subject of the present proceedings is the allocation to one unit or holding, and, in this particular case, the holding has been fortunate in that the allocation has been received on the footing of 24*s.* 0*d.* in the *l.* in respect of the valuation of the holding.

The questions which I have to determine concern the shares in which the sum received in respect of the holding ought to be divided between the various parties who had interests as freeholder, lessee or under-lessee, in the property included in the holding, and include the question whether failure to register under the Coal (Registration of Ownership) Act, 1937, or to make a claim, prevents any of the lessees or under-lessees from claiming a share.

Section 7 of the Act of 1938, which bears the cross-heading "Ascertainment and Distribution of Compensation," is as follows: "Sub-s. 1. The sums to be paid for compensation "as aforesaid shall be ascertained by valuation, in accordance "with the provisions of this section, of the interests, other "than retained interests, that subsist at the valuation date "in coal, mines of coal and acquired property and rights "(in this Act referred to as 'acquired interests'). Sub-"s. 2. The subject of each valuation shall be a unit (in "this Act referred to as 'a holding') consisting of an "acquired interest, or of a group of such interests, that is under "the provisions of the Third Schedule to this Act to "constitute a unit for compensation purposes. Sub-s. 3. In "order for compensation to be payable in respect of any hold-"ing, the requirements of the Third Schedule to this Act as to "(*a*) the registration of particulars under the Coal (Registration "of Ownership) Act, 1937, (in this Act referred to as the "'Registration Act'); and (*b*) the making of claims for "compensation: must be satisfied within the limits of time "specified in that schedule. Sub-s. 4. The value of a "holding shall be taken to be the amount which the holding "might have been expected to realize if this Act had not been "passed and the holding had been sold on the valuation "date in the open market by the existing owners thereof, "selling as willing vendors to a willing purchaser, under a "contract providing for completion thereof on the vesting "date, so however that, where a right to withdraw support "is to vest in the Commission with coal or a mine of coal "in which a holding subsisted, it shall be valued as if each "of the existing owners thereof, having power to grant that "right to the purchaser for an interest corresponding to the "existing owner's interest in the coal or mine, had agreed "so to grant it in addition to any acquired rights in which "the holding subsisted." Then follow some further provisions with which I need not deal, and sub-s. 9 provides that "Subject as aforesaid, the compensation payable under "s. 6 of this Act shall be ascertained and paid subject to and "in accordance with the provisions of the Third Schedule "to this Act."

Turning to Part IV of sch. III to the Act, I find that para. 21 bears a cross-heading "Disposal of Compensation "as between beneficial interests," and sub-para. (1.) is in the following terms: "The compensation for a holding when "paid by the Commission to the person entitled to receive it "from them, including any sum paid on account thereof "under paras. 19 or 20 of this schedule, and the income "thereof, shall, in order to its being applied as compensation "to the persons whose interests are comprised in the holding, "be held and disposed of for the benefit of those persons, or "their personal representatives or assigns, in accordance "with the succeeding provisions of this paragraph."

Sub-paragraph (2.) deals with interests under a settlement and was considered in *In re Duke of Leeds* (1), *In re Blandy-Jenkins* (2), and *Williams* v. *Sharpe* (3). The present case does not fall within that sub-paragraph or sub-paras. (3.), (4.) or (5.). Sub-paragraph (6.) appears to be material, and is in the following terms: "Subject as aforesaid the "compensation for a holding and the income thereof shall be "held and disposed of in such manner as to confer on the "existing owners whose interests are comprised in the holding, "their personal representatives or assigns, the like benefits "so far as may be, as they would have had from their respective "interests in the premises in which the holding subsisted if "those premises had not been acquired by the Commission."

Section 44 of the Act (which is the interpretation section) contains the following material definitions: "'Claiming "'under' shall be construed, in relation to a person referred "to as claiming under the estate owner in respect of the fee "simple, or under the estate owner in respect of a term of "years, in any land, as referring to any person interested "in that land in respect of" and then, after the cases of (*a*) equitable interests, (*b*) mortgages and (*c*) rent charges, I find: "(*d*) a term of years under a lease, other than a coal "mining lease, which is derived out of that fee simple or of "that term of years, as the case may be (either immediately "or by way of under-lease derived out of a lease other than a "coal mining lease), or an interest created out of such a term "of years." "'Existing owner' means, in relation to any "coal or mine of coal, all persons who have at the valuation "date an acquired interest therein"; "'Lease' includes "an under-lease, or tenancy and an agreement for a lease, "under-lease or a tenancy" (with qualifications excluding options and mortgages).

It is also necessary to refer to Part I of sch. III to the

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(1) [1947] Ch. 525.

(2) [1948] Ch. 322.

(3) Ante p. 595.

Act, which by para. 1 deals with the acquired interests, or groups of such interests, which are to constitute a unit for compensation purposes, and provides (in substance) that in the case of (*a*) each freehold reversion on a coal mining lease; (*b*) each leasehold reversion on a mining lease; and (*c*) each freehold in possession, the unit for compensation purposes is to be the interest therein of the estate owner in respect of the fee simple, or in respect of the term created by the lease out of which an under-lease was derived, "together with the "interests therein of all persons claiming under him." There are similar provisions in the Coal (Registration of Ownership) Act, 1937. These can be more conveniently referred to when I deal with the question of registration and the making of a claim, but they assist me in reaching the conclusion which I have arrived at on this part of the case also.

Now the position in the present case is that (at any rate for the purposes of the present application) the interests to be dealt with are all legal estates. Sir Oswald Mosley had the legal fee simple and the lessees and under-lessees had legal terms of years. When the leases were granted between 1811 and 1880 the mining lease of 1740 was in existence, and, if and in so far as an interest in the minerals included in that lease passed to the lessees, it was a reversionary interest and they took subject to the terms of the mining lease. But the reversion was very near the date of falling in on January 1, 1939. In such cases, as the minerals had not been excepted from the leases, the title of Sir Oswald Mosley to grant the leases of 1909 and 1927 is open to question, but the lease of 1909, of course, did not extend the term granted by the lease of 1740.

Apart from the question of any existing mining lease, the legal position appears to have been that the landlord could not work the minerals until the determination of any long term of years, because he had parted with the minerals for that period, and the lessees or under-lessees could not work the minerals, because to do so would amount to waste.

Mr. Cope Morgan contended on behalf of Sir Oswald Mosley (as I understood his argument) that the lessees had not really got any interest in the minerals and that all they had was a cause of action against Sir Oswald Mosley or his predecessors for damages, which (as they could not work the minerals) must be trifling, or a right not to have the surface let down against which they were adequately protected by the provisions of the lease of 1909. Accordingly he contended that the value of the interests of the lessees and under-lessees was nothing or so small a sum that the maxim "de minimis" should apply, and he contended that this represented a practical view, which would have the advantage, of course, that the complications caused by the leases and under-leases could be wholly disregarded.

But this seems to me to disregard the legal realities of the case. An interest in land or minerals is none the less an interest because it is reversionary, and, on January 1, 1949, (the valuation date), the reversion was very near becoming an interest in possession, so far as the leases of 1740 and 1909 are concerned. If the lessees or under-lessees could not work the minerals, neither could Sir Oswald Mosley until the lessees' interest expired, unless some arrangement was come to. In my view, it is plain that the lessees and under-lessees are "existing owners whose interests are comprised "in the holding" within the meaning of para. 21, sub-para. 6 of sch. III to the Act, and accordingly the compensation is to be held and disposed of so as to confer on them the like benefits in accordance with the provisions of that paragraph.

I was referred by Mr. Wilfrid Hunt to a case concerning copyholds considered by the Railway and Canal Commission Court in *In re Markham Main Colliery Ld.* (1). This does seem to provide some basis of comparison, because, though the minerals were vested in the Lord of the Manor, he could not in fact work them without the concurrence of the copyholders. The court divided the royalties in the proportion of two-thirds to the Lord of the Manor and one-third to the copyholders. It was claimed in that case that division in equal shares was usual in such cases. In the present case I am not given any practical assistance from actual examples because Mr. Edwin Morgan, who made affidavits in this case, though a mining engineer of experience, could not recollect ever having had a similar case in which the interests of freeholder and lessee were concerned in regard to the minerals. It seems to me that the lessees and under-lessees are entitled to share in the parts of the compensation in the present case which are properly referable to the plots in which they have an interest. The parties requested me to decide the respective shares of the freeholder and the lessee in such parts, and, giving the best consideration that I can to the somewhat

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(1) (1926) 134 L. T. 253.

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incalculable factors to be considered, my view is that a fair division would be 50 per cent. to the freeholder and 50 per cent. to the lessee. It was admitted that on this footing the lessee's share must be reduced by further division where there is an under-lease of the property in question, and that I could not be expected to give a ruling as to the method of such division on the information at present before me, as the situation must depend upon the facts of each particular case. The position, therefore, as between lessee and under-lessee must be reserved.

Having decided this question of principle, I now have to decide whether lessees or under-lessees who have failed to register particulars in accordance with the Coal (Registration of Ownership) Act, 1937, or to make a claim, are now debarred from sharing in the compensation paid.

The Coal (Registration of Ownership) Act, 1937, (according to the preamble) was passed " to make provision for the " ascertainment and registration of particulars as to the " proprietary interests in unworked coal and mines of coal " and certain associated matters, and was a necessary preliminary to the acquisition by the Coal Commission of the coal and mines under the Coal Act, 1938. Section 1, sub-s. 1, provides that " for the purpose of recording such particulars as are herein- " after mentioned as to the proprietary interests that subsist " in coal and mines of coal in Great Britain and in certain " property and rights held in association therewith, the " Board of Trade shall establish a register, to be called ' the " ' Coal Holdings Register '." Sub-section 3 is as follows: " Registrations under this Act shall be effected in respect " of such proprietary interests or groups of proprietary interests " as are, under the provisions of the First Schedule to this Act, " to be treated as constituting units of separate ownership, " and applications for registration must be made accordingly. " Any such interest or group of interests is in this Act referred " to as a ' holding '." By s. 4, " proprietary interest " is defined as meaning " any interest in coal hereditaments " with the exception of (*a*) an interest arising under a coal " mining lease in coal hereditaments comprised therein that " are not comprised in any under-lease derived out of that " lease, and (*b*) an interest arising by virtue of the grant of " a right under the Mines (Working Facilities and Support)

" Act, 1923, either as originally enacted or as extended by " s. 13 of the Mining Industry Act, 1926."

Paragraph 1 of sch. I contains provisions similar to those enacted in Part I of sch. III to the Coal Act, 1938, and a definition of " person claiming under " similar to the definition contained in s. 44 of that Act. The precise terms of para. 1, sub-para. 1, are as follows: " Subject to the provisions of " para. 2 of this schedule " (which provides for rules to be made by the Board of Trade for the consolidation or division of units) " each of the following proprietary interests, or groups " of proprietary interests, in coal hereditaments shall constitute a unit of separate ownership for the purposes of this " Act, namely: (*a*) each freehold reversion (that is to say, " in the case of all the coal and mines of coal that are " comprised in a coal mining lease derived immediately out " of the fee simple and in the case of property and rights " held in association with any such coal or mine, the interest " therein of the estate owner in respect of the fee simple in " the coal and mines together with the interests therein of " all persons claiming under him); (*b*) each leasehold reversion " (that is to say, in the case of all the coal and mines of coal " that are comprised in a coal mining lease that is an underlease and in the case of property and rights held in association " with any such coal or mine, the interest therein of the estate " owner in respect of the term of years out of which that underlease is immediately derived together with the interests " therein of all persons claiming under him); (*c*) each freehold " in possession (that is to say, in the case of all coal and mines " of coal that are not comprised in any coal mining lease " and are in the legal ownership as respects the fee simple " of the same estate owner and in the case of property and " rights held in association with any such coal or mine, the " interest therein of the estate owner in respect of the fee simple " in the coal and mines together with the interests therein " of all persons claiming under him)."

Sub-paragraph 2 provides as follows: " In this paragraph " the expression ' person claiming under ' means, in relation " to a person referred to as claiming under the estate owner " in respect of a fee simple, or under the estate owner in " respect of a term of years, a person interested in respect of " and then, after referring to (*a*) equitable interests, (*b*) mortgages, and (*c*) rent charges, there appears the following provision: " (*d*) An interest arising under a lease, other than a coal "mining lease which is derived out of that fee simple or of that "term of years, as the case may be, either immediately or "by way of under-lease derived out of a lease other than a "coal mining lease."

By para. 1, sub-para. 1, of Part I of sch. II an application for the registration of particulars in respect of a holding must be in the prescribed form, and supported by a statement and a statutory declaration, and sub-para. 2 provides as follows: "An application for the registration of particulars in respect "of a holding must be made by a person who has a proprietary "interest that constitutes or is comprised in a holding," with a proviso that is immaterial for the present purpose.

Paragraph 5, sub-para. 1, of the same schedule contains provisions for the payment by the Commission of the costs reasonably incurred "by the person by whom an application "for the registration of particulars in respect of a holding "is duly made in giving effect in relation to that holding to "the provisions of Part I of this schedule," with a proviso evidently designed to limit the liability of the Commission to one set of costs in respect of each holding and to discourage a number of applications for registration in respect of the same holding. There is a similar provision in respect of the costs of valuation proceedings in para. 15 of sch. III to the Coal Act, 1938. Paragraph 6 of that schedule provides that "in order for compensation to be payable under s. 6 of this "Act in respect of a holding, an application for the registration "under the Registration Act of particulars in respect thereof "must have been made before the valuation date, or, if not "so made, must have been made within the period of six "months beginning on that date."

Finally, it will be remembered that s. 7, sub-s. 3, of the Coal Act, 1938, provides that in order for compensation to be payable in respect of any holding, the requirements of sch. III to the Act as to (*a*) the registration of particulars under the Coal (Registration of Ownership) Act, 1937, and (*b*) the making of claims for compensation, must be satisfied within the limits of time specified in that schedule.

It seems to me that if particulars in respect of a holding are registered and a claim is made by some person who has a proprietary interest in the holding, the requirements of the Acts are satisfied, and there is no obligation on the other persons who may be interested to carry out these requirements—indeed the duplication or multiplication of proceedings in respect of these matters is discouraged. It is evident to my mind that the object of the Acts was to secure that particulars should be sent in of every holding so that a proper valuation of all the relevant holdings could be obtained and the Coal Commission were not to be troubled with the claims of the various persons who might be interested in the sum of compensation awarded in respect of a holding when that sum had been duly ascertained. There appears to be nothing in either of the relevant Acts to deprive a person with an interest of his right to share in the compensation awarded by reason of his failure to register particulars or to make a claim, and in order to deprive a person of his interest it is necessary to find some statutory provision for such a confiscatory act. Mr. Cope Morgan called my attention to the provisions of s. 37 of the Coal Act, 1938, enabling the time for registration to be extended and pointed out the inconveniences of an unlimited period during which claims to share in the sum awarded could still be made. As he said, there must be finality sometime. But this court is not unfamiliar with cases in which parties who might be interested in a fund fail to put in their claims and the court frequently gives trustees liberty to distribute on the footing of the claims that are known so that they are absolved from the risk of further liability. It is a temptingly simple solution in the present case to exclude at once all those who have neither registered particulars nor made a claim, but in my opinion it is not authorized by the provisions of these Acts.

I am, therefore, prepared to make a declaration on questions 1 and 3 of the summons that lessees and under-lessees are entitled to share in the compensation, whether or not they have made applications in due time for registration of particulars of ownership under the Act of 1937, and I have expressed the opinion that 50 per cent. of the compensation is the appropriate share of the freeholder and the remaining 50 per cent. should go either to the lessees or be divided in some manner to be ascertained between the lessees and the under-lessees (where there are under-leases) in each case by reference to the area of the properties in the holding which are relevant. This answers question 2.

In view of the decision which I have reached inquiries will be directed as asked by para. 4 of the summons and there will be liberty to apply.

It remains to deal with the costs of this application. The

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question of how the costs of the summons should be dealt with depends on certain provisions of the Coal Act, 1938. Paragraph 22, sub-para. 1, of sch. III to the Coal Act, 1938, which has been amended by the Act of 1943 provides: "Subject to the provisions of this paragraph and of s. 39 "of this Act, the Commission shall pay the costs reasonably "incurred by any person (*a*) in connexion with the ascertain-"ment of the person entitled to the compensation for the "holding; and (*b*) in a case in which the compensation for "the holding is paid into court"—which does not apply, because no payment into court has been made in this case—"or (*c*) in a case in which the compensation is paid otherwise "than as aforesaid, in connexion with any application to "the court that may be requisite for the purpose of deter-"mining the manner in which the compensation ought to be "held and disposed of."

It will be remembered that para. 21, sub-para. 6, contains a provision: "Subject as aforesaid the compensation for a "holding and the income thereof shall be held and disposed "of in such manner as to confer on the existing owners whose "interests are comprised in the holding, their personal "representatives or assigns, the like benefits so far as may "be, as they would have had from their respective interests "in the premises in which the holding subsisted if those "premises had not been acquired by the Commission."

As has been pointed out by Mr. Bonner, everything that is said in para. 22 is subject to the provisions of s. 39 of the Act, and s. 39 of the Act provides: "The provisions of this "Part of this Act and the provisions of the Registration "Act with respect to the payment of costs by the Commission "(other than the provisions of s. 11 of this Act) shall have "effect subject to the following limitation, namely, that their "liability shall not extend to costs incurred after the date "of the passing of this Act that are occasioned by any "proceedings for the determination of disputes between "adverse claimants, and in giving effect to the provisions "of this section regard shall be had so far as practicable to "the principles observed in giving effect to the corresponding "provisions of s. 80 of the Lands Clauses Consolidation Act, "1845." That section of the Lands Clauses Consolidation Act, 1845, contains very similar provisions about adverse litigation and has been often the subject of decisions of the court. Mr. Bonner referred me to three cases: *In re*

Bareham (1); *In re English* (2); and *In re Longworth's Estate* (3); all showing the principles on which the Lands Clauses Consolidation Act provisions have been applied in dealing with claims by parties to money which has been paid into court in respect of land taken compulsorily under the provisions of some special Act incorporating the provisions of s. 80 of the Lands Clauses Consolidation Act, 1845.

Of course it is well known that the promoters do not pay the costs which are occasioned by adverse litigation as construed in a case of that kind, but those cases do not really, in my view, apply to the present case. Though it is quite true that there may be competing claims before the court in the present case, in my view, it is not a case of adverse litigation. The application was caused not so much by the adverse claims, because the position of the parties before the Act affected their interests was really quite well known. The trouble has perhaps been caused by the unavoidable obscurity of certain provisions of the Coal Act and questions as to the proper construction of those provisions and, of course, their application to the interests of the parties in the present case.

It seems to me, therefore, that this is a case in which the costs of the present application down to and including today ought to be paid by the Coal Commission. That, of course, does not include the further costs of these proceedings, which it will be necessary to consider after the inquiries which I have ordered are taken, and all future costs are reserved and will be dealt with at the proper time.

Declaration and order accordingly.

Solicitors: *Kirby, Millett and Ayscough; Sharpe, Pritchard & Co., for P. B. Dingle, Town Clerk, Manchester; J. B. Purchase and Clark, for Roberts, Riley & Anderson, Manchester; Grinling, Harris & Co., for Marsh and Ferriman, Worthing; Solicitor, National Coal Board.*

(1) (1881) 17 Ch. D. 329.

(2) (1865) 12 L. T. (N. S.) 561.

(3) (1845) 1 K. & J. 1.

J. L. D.

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Mar. 23, 24, 25, 28; Apr. 8.

Landlord and tenant—Affirmative covenant "to use" demised premises "between 9 a.m. and 6 p.m. . . . . as offices in connexion with "lessee's business . . . . of a surveyor and for residential purposes" —Negative covenant "not to . . . . underlet or part with possession ". . . . without written consent (not to be unreasonably withheld) "of lessor"—Proviso that lessor might withhold consent if in his opinion proposed . . . . under-lessee was for any reason in his absolute discretion undesirable as occupant . . . . or under-lessee—Effect of covenants—Breaches by lessee of both covenants—Sub-letting without consent to law agents and stationers—Covenant in sub-lease to "use as offices in connexion with" that business—Forfeiture—No waiver where rent demanded after knowledge of breaches but without intention to waive breaches—Counterclaims by lessee and sub-lessee respectively for relief from forfeiture—Principles applicable in exercising discretion—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-ss.* 2, 4.

By a lease dated January 4, 1946, the plaintiff, a solicitor, demised a floor in a house of which he was owner and part occupier to the first defendant, Summersell, a surveyor and valuer. By cl. 4 of the lease the lessee covenanted "to use the said rooms "and offices between the hours of 9 a.m. and 6 p.m. (except "when the exigencies of business may require longer hours of "attendance), as offices in connexion with the lessee's business and "profession of a surveyor and valuer, and also for residential "purposes," and by cl. 5 "not to . . . . underlet . . . . without "the consent (not to be unreasonably withheld) of the lessor "first had and obtained save that the lessor reserves the right "to decline to give his consent if in his opinion the proposed . . . . "under-lessee is for *any* reason in his discretion undesirable "as an occupant . . . . or under-lessee." There was the usual proviso for re-entry. The first defendant remained in the employment of the Air Ministry and never went into occupation.

Between May and August, 1947, there was correspondence between the plaintiff and the first defendant concerning a proposed sub-lease to the second defendants, who were well known as (inter alia) law stationers, law agents and process servers; and on August 12, 1947, the first defendant, without having expressly asked the plaintiff for consent to the sub-letting or waiver of the covenant as to user, executed a sub-lease of the floor for the remainder of the term less three days to the second defendants. The sub-lease contained covenants against sub-letting, etc., and a covenant "to use the said rooms and offices "between the hours of 9 a.m. and 6 p.m. (except when the "exigencies of business may require longer hours of attendance)

[Reported by L. L. LOEWE, Esq., Barrister-at-Law.]

"as offices in connexion with the [under] lessee's business and "profession of law agents and stationers." The second defendants had knowledge of the covenants in the head-lease and their solicitors had sought but not pressed for the head-lessor's consent or waiver. They went into occupation on September 27, 1947, and on October 6, 1947, the plaintiff's clerk sent a routine demand for rent to the lessee, who paid it with a cheque which was returned to him on October 24, 1947.

In an action for possession brought by the plaintiff against both defendants, in which the lessee and sub-lessees respectively counterclaimed for relief under s. 146, sub-ss. 2 and 4 of the Law of Property Act, 1925:—

Held, (1.) that since the lessee had not gone into occupation there was a continuing breach of the positive obligations imposed by cl. 4 of the lease. (2.) That the consent of the lessor to the sub-letting had never been asked and that therefore there had been a breach of cl. 5, notwithstanding the proviso thereto, which was invalid in so far as it went beyond s. 19, sub-s. 1 (*a*) of the Landlord and Tenant Act, 1927. (3.) That the demand for rent made by the clerk was not an unequivocal act by the plaintiff affirming the existence of the lease and therefore did not constitute a waiver binding upon the plaintiff. (4.) That notwithstanding the wider powers conferred by the Law of Property Acts, 1925 and 1929, the jurisdiction to grant relief must still be sparingly exercised, and here it would be inequitable to force upon the plaintiff, by way of relief to the second defendants, privity of contract with persons unacceptable to him and to compel him to concede a wider user of his premises than the user prescribed in the head-lease.

Matthews v. *Smallwood* [1910] 1 Ch. 777, *Doe d. Nash* v. *Birch* (1836) 1 M. & W. 402, *Croft* v. *Lumley* (1858) 6 H. L. C. 672, considered and discussed.

WITNESS ACTION.

The plaintiff Leslie Creery, a solicitor, was the freeholder and part occupier of premises in Great James Street, London, W.C.1, in which the defendant, James Summersell, a surveyor and valuer, was tenant of the second floor under a lease dated January 4, 1946 for twenty-one years from Christmas, 1945, at a rent of 150*l.* per annum. The lessee covenanted by cl. 4 of the lease "to use the said rooms and offices between the hours "of 9 a.m. and 6 p.m. (except where the exigencies of business "may require longer hours of attendance), as offices in connexion with the lessee's business and profession of a surveyor "and valuer and also for residential purposes"; and by cl. 5: "Not to . . . . under-let without the consent (not to be "unreasonably withheld) of the lessor first had and obtained "save that the lessor reserves the right not to give his consent "if in his opinion the proposed . . . . sub-lessee is for any "reason in his discretion undesirable as an occupant . . . . or "under-lessee." The lease contained the usual proviso for re-entry. The plaintiff occupied part of the property for his business of a solicitor and had let other parts to surveyors and one part to a commercial private company. Summersell remained in the forces and never went into occupation of the floor demised to him. In April, 1947, he began negotiations for a sub-lease of the floor to Flowerdew & Co. Ld., a firm of law agents and stationers whose business it was to perform all the services, including process-serving, which a layman may do for a lawyer. Between the ensuing May and August there was correspondence between the plaintiff and the defendants on the subject of the proposed sub-letting to Flowerdew & Co. Ld. in which (as his Lordship found) consent was never expressly asked or expressly given. In June, 1947, Flowerdew & Co. Ld. and their solicitors had knowledge of the covenants 4 and 5 in the head-lease and indicated to Summersell's solicitors the necessity of waiver or consent by Creery; but a sub-lease was completed through the post (and without those points being resolved) on August 12, 1947, whereby Summersell sub-demised the premises to Flowerdew & Co. Ld. for the remainder of the term less the last three days at a rent of 350*l.* per annum, and the sub-lessees covenanted not to sub-demise, etc., and "to use "the said rooms and offices between the hours of 9 a.m. and "6 p.m. (except when the exigencies of business may require "longer hours of attendance) as offices in connexion with "the [under] lessees' business and profession of law agents "and stationers." Flowerdew & Co. Ld. went into occupation on September 27, 1947. On October 6, 1947 (as his Lordship found) the plaintiff's clerk sent a routine demand for a quarter's rent to Summersell who paid it by a cheque which was returned to him on October 24, 1947. On November 17, 1947, the plaintiff, after serving on October 27 notice under s. 146, sub-s. 1, of the Law of Property Act, 1925, (1) commenced this

(1) Law of Property Act, 1925, s. 146, sub-s. 2: "Where the "lessor is proceeding to enforce "such a right of re-entry or "forfeiture, the lessee may . . . . "apply to the court for relief; "and the court may grant or "refuse relief, as the court, "having regard to the pro- "ceedings and conduct of the "parties under the foregoing "provisions of this section, and "to all the other circumstances, "thinks fit; and in case of such "relief may grant it on such "terms, if any, as to costs,

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action claiming possession against Summersell and Flowerdew & Co. Ld. and other relief. The defendant, Summersell, counterclaimed under sub-s. 2, and the defendant, Flowerdew & Co. Ld., counterclaimed under sub-s. 4 of that section for relief from forfeiture. Flowerdew & Co. Ld. sued Summersell as third party for indemnity under a provision in that behalf contained in the sub-lease of August, 1947. For Summersell and for Flowerdew & Co. Ld. respectively it was contended in the action that (1.) the plaintiff's letters to Summersell amounted to consent to Summersell to the under-letting to Flowerdew & Co. Ld. for the purpose of the latter's business; (2.) alternatively, consent could not have been reasonably withheld—the concluding words of cl. 5 in the head-lease being repugnant to the Landlord and Tenant Act, 1927, s. 19, sub-s. 1 (*a*); and that there was in the circumstances also a waiver by the plaintiff of the covenant as to user so as to authorize the carrying on of Flowerdew & Co. Ld.'s business; (3.) the demand for rent constituted waiver.

On the respective counterclaims his Lordship considered certain authorities in the light of the Law of Property Act, 1925, as amended in 1929.

Raymond Jennings K.C. and *J. A. Reid* for the plaintiff landlord. Both the user and the respectability of the intended sub-lessee were of importance to the plaintiff, but the lessee ignored the question of user and thought that the landlord could not withhold consent if the sub-lessee were respectable. This is fallacious: see the judgment of Denning J. in *Wilson* v. *Fynn* (1). The lessee was not justified in implying consent from the correspondence, and is not entitled to relief because, having granted the under-lease, he is in continuing

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"expenses and damages . . . . "as the court, in the circumstances of each case, thinks "fit."

Sub-section 4: "Where a lessor "is proceeding by action . . . . to "enforce a right of re-entry "on forfeiture under any covenant ". . . . in a lease . . . . the court "may, on application by any "person claiming as under-lessee "any estate . . . . in the pro"perty comprised in the lease ". . . . in the lessor's action ". . . . make an order vesting, "for the whole term of the lease "or any less term, the property "comprised in the lease . . . . in "any person entitled as under-lessee to any estate . . . . in "such property upon such con"ditions . . . . as the court may, "in the circumstances of each "case, think fit."

(1) [1948] 2 All E. R. 40.

breach which he cannot remedy. The sub-lessees are not entitled to relief because they accepted the lease with notice of the covenants in the head-lease and had failed to see or verify that the plaintiff consented to the under-lease to them or waived pro tanto the covenant in the head-lease as to user.

Milner Holland K.C. and *Armstrong Cowan* for the first defendant, the lessee. This is a technical action, in which the landlord must show a clear breach of a clear covenant. Here there is a form of covenant rarely seen. Clause 4 obliges the lessee to use the rooms as offices; the words "in connexion "with, etc." are merely descriptive. On that construction it is a covenant to use the premises as offices, which is not broken by the present user. The clause does not say "*only* "in connexion with his business." Clauses 4 and 5 marry ill, because any parting with possession would be a breach of cl. 4, and any consent to an assignment would carry with it a waiver of that clause. Clause 4 is too uncertain for the court to find a breach thereof clear enough to entitle the plaintiff to relief on what is a penal claim. It is grammatically possible to say that all user is limited to the hours between 9 a.m. and 6 p.m. If there was a positive covenant to use the premises himself, it was inconsistent with cl. 5, and, moreover, the lessee must on that footing have been in breach since August, 1946. The demand for rent on October 6 was an act which unequivocally recognized the tenancy after the landlord knew of the breach; the clerk was the landlord's general agent for demanding rent, and his act was the plaintiff's act: see the judgment of Parke B. in *Doe d. Nash* v. *Birch* (1). There is no substance in the plaintiff's complaint; he has suffered no injury. He never made his position clear, and doubtful documents should be construed against a plaintiff seeking penal relief. [He referred to *Russell* v. *Beecham* (2), to the judgment of Lord Tenterden C.J. in *Doe d. Abdy* v. *Stevens* (3), and to Halsbury, Laws of England, Hailsham ed., vol. 20, p. 249, para. 282.]

Henry Salt K.C. and *W. T. Elverston* for the second defendants, the sub-lessees, adopted the arguments of Milner Holland K.C. Clause 4 is a positive covenant which would require to be waived if it stood alone; cl. 5 is negative

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(1) (1836) 1 M. & W. 402, 408.
(2) [1924] 1 K.B. 525, 535, 538.
(3) (1832) 3 B. & A. 299, 302.

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involving the question of consent. The two clauses must be considered together. The proviso reserving to himself absolute discretion which the lessor had tried to tack on to the term " not to be unreasonably withheld " was repugnant to s. 19, sub-s. 1, of the Landlord and Tenant Act, 1927. Any consent given to an application to sub-let, in which a specific person and his business were named, would involve a waiver of cl. 4 : see *Russell* v. *Beecham* (1) and the judgments therein of Scrutton and Atkin L.JJ. Clause 4 is stringent and personal to the original lessee ; the user is specified and could not be construed as the business of the lessee for the time being, as in Denning J.'s decision in *Wilson* v. *Fynn* (2). Clause 5 is dominant and is a qualification of cl. 4 ; the two clauses are either inconsistent and should be reconciled or cl. 4 is subject to a waiver by way of a concession of the qualification under cl. 5, which operates as a proviso to cl. 4. The correspondence should be construed against the plaintiff ; he had not been candid ; Summersell as a layman could reasonably deduce from his language that so far from asserting his rights he (the plaintiff) was not pressing them. The demand for rent was a waiver of the covenant as to user, because the two clauses could not be separated : see the judgment of Parke B. in *Doe d. Nash* v. *Birch* (3). It was an unqualified demand on the first defendant in his capacity as lessee, and was a recognition of the tenancy and therefore a waiver of both covenants. The plaintiff's indication that he would be, and was, satisfied by a banker's reference only concerning Flowerdew & Co. Ld. constitutes an estoppel : see *De Bussche* v. *Alt* (4). " If a person having a right, and " seeing another person about to commit an act . . . . " infringing it, stands by in such a manner as to induce the " person to believe that he assents to its being committed, " he cannot afterwards be heard to complain of the act." Those principles apply here, where a lessee, a layman, writes to his lessor, a solicitor, who answers : " My only concern " is to know about the sub-lessee's banker's reference." The lessee thinks that it means consent in respect of user.

Raymond Jennings K.C. in reply. There is no authority, other than a dictum, for the proposition that a demand for rent operates as a waiver, and that the act of an agent operates as waiver by the principal. There could be no more cautious dictum than that of Parke B. in *Doe d. Nash* v. *Birch* (1). "If it had been proved . . . . the forfeiture "might have been waived." Here the demand for rent cannot amount to a waiver; the court must be satisfied that it was an unequivocal act by the landlord intending to waive the forfeiture or treat the lease as subsisting. The answer to the question depends on the particular circumstances. A routine demand for rent by a clerk is not equivalent to a specific demand for rent by the landlord and is no waiver; so to regard it would be too great an extension: see *Matthews* v. *Smallwood* (2) and *Abram Steamship Co.* v. *Westfield Shipping Co.* (3). The governing factor is the intention of the party to whom waiver is attributed. The plaintiff had never consented to the under-lease; he did not know and had no opportunity of considering what was involved by the sublessee's business; the sub-lease was valid for twenty years for the business of law-agents and stationers, which might allow a wide type of user. He had said from the beginning that he wished to be satisfied about the respectability of the sub-lessees and their proposed user; he had not been deliberately obscure. Clause 4 cannot be void for uncertainty; it can be construed either strictly or as a negative obligation not to use the premises or permit their user for any other purpose.

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(1) [1924] 1 K. B. 525, 535, 538.

(2) [1948] 2 All E. R. 40.

(3) 1 M. & W. 402, 408.

(4) (1878) 8 Ch. D. 286, 314.

Milner Holland K.C. in rejoinder. There was a waiver. Parke B. refers to *Green's* case (4): see also Woodfall on Landlord and Tenant, 21st ed., p. 406, ch. VIII., s. 5, subhead (*f*).

[His Lordship, having intimated that there had been a breach, proceeded to hear the counterclaim for relief.]

Milner Holland K.C. for the lessee, on the counterclaim. The lessee took the view that consent to the under-lease carried with it a waiver of cl. 4. The court has complete jurisdiction under s. 146, sub-s. 2, of the Law of Property Act, 1925. The sub-lessee has been willing to submit to a limited user if imposed. The plaintiff had no real apprehension about a firm exclusively concerned with law coming into premises which contained solicitors, surveyors and a

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(1) 1 M. & W. 402, 408.

(2) [1910] 1 Ch. 777, 786.

(3) [1923] A. C. 773.

(4) (1582) Cro. Eliz. 3.

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commercial firm: see the judgment of Lord Goddard C.J. in *House Property, etc., Co.* v. *James Walker Ld.* (1); there the breach was irremediable; the court would have little jurisdiction if the lessee had to eject his tenant. Here the lessee's mistake in implying consent should be viewed against the background of the correspondence in which he got an equivocal answer; he should not be punished for it by forfeiture of the lease altogether. The plaintiff has suffered no substantial injury, and should not be allowed to take advantage of a position to which he had himself contributed by culpable equivocation. The lessee should retain on terms the estate which had been created in his favour.

Henry Salt K.C. for the sub-lessees, on the counterclaim. The grant of relief is a matter of discretion and is at large notwithstanding *Matthews* v. *Smallwood* (2). The older authorities can be regarded as to some extent obsolete since the enactment of the Law of Property Act, 1925, as amended in 1929. *Imray* v. *Oakshette* (3) was criticized by McCardie J. in *Hurd* v. *Whaley* (4). In *Rose* v. *Spicer* (5) it was laid down that the breach should be remedied. Here the sub-lessee asks to remain in possession on the footing of a user limited to the plaintiff's requirements and payment of compensation under sub-s. 4. He has a right to relief because apart from the change of user consent could not have been reasonably refused; the landlord is no worse off if the sub-lessees limit themselves to his requirements in respect of user. The sub-lessees never have used the property for the branch of their business which consists of process serving and they are willing to undertake not to do so in future. [He referred to Lord Goddard C.J.'s judgment in *House Property, etc., Co.* v. *James Walker Ld.* (6), where relief was granted notwithstanding a change of user involving a continuing breach.] The head-lease could here be vested in the under-lessee until the next break, at a suitable rent.

J. A. Reid, in reply, referred to Woodfall on Landlord and Tenant, 24th ed., p. 942, foi principles of granting relief. Relief must be exercised sparingly, and should not be granted where the applicant is careless or forgetful: see *Barrow* v. *Isaacs* (7). The burden is on the lessee, and he has not discharged it; he is only concerned to protect a profitable investment. He knew consent was required, but tried to prevent the landlord with a fait accompli, instead of giving him an answer as to what the premises were going to be used for. Such a man is not entitled to relief. The sub-lessee was in a difficult position, but solely on account of the error of his solicitors, who received a copy of the proposed under-lease on June 19, 1944, and made a note of the need for a licence, but did not press for it until after completion by post of the sub-lease. The sub-lessees have no equity. They were at fault in assuming that the head-lessor's consent or waiver would be forthcoming, although they did not know the terms of the correspondence between the plaintiff and the first defendant. The professions of the persons actually occupying the premises are under the control of governing bodies; that of the sub-lessees is not, and user should be restricted to such professions as those of the present occupants.

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(1) [1948] 1 K. B. 257, 260.
(2) [1910] 1 Ch. 777.
(3) [1897] 2 Q. B. 218.
(4) [1918] 2 K. B. 448, 450, 451.
(5) [1911] 2 K. B. 234.
(6) [1948] 1 K. B. 257.
(7) [1891] 1 K. B. 417, 418, 420.

April 8. HARMAN J., having stated the facts, continued: These being the facts, my first task is to construe the lease. Now I suspect that the parties intended that cl. 4 should operate as though it were a covenant by the lessee not to use the demised premises nor permit them to be used except as offices and so on. Certain evidence was tendered to show the original form of the covenant as proposed by the lessor and the alterations made by the lessee; but this, in my judgment, is inadmissible, nor is it legitimate to speculate on the intentions of the parties. Covenants of this sort which may work a forfeiture have always been strictly construed against the lessor, and that rule I propose to follow. In my judgment, cl. 4 imposes on the lessee—that is to say, the first defendant personally—a positive obligation to use the demised premises between the hours indicated as offices in connexion with his business and profession of a surveyor and valuer, or alternatively to use them for residential purposes. Now he did neither of these things, and never has done either of them, and consequently I hold that there has been (subject to what I shall say about cl. 5) and is a continuing breach of this covenant. Clause 5 starts in a familiar form, but seeks to reserve to the lessor rights to withhold his consent which are invalid in so far as they go beyond s. 19, sub-s. 1 (*a*) of the Landlord and Tenant Act, 1927. Reasonableness is the only touchstone by which the validity of a refusal of consent must be tested. It is hardly necessary to point out that the fact that the consent may not be unreasonably withheld does not make this clause a formality, even if the proposed tenant is a respectable and responsible person. In my judgment, this clause has this much connexion with the preceding clause—that if the lessor does give his written consent or if, he having withheld it unreasonably, the lessee is entitled to act as though consent had been given, then the obligation of the lessee under cl. 4 is necessarily waived or suspended for the period of a valid assignment or underletting.

The main question, therefore, to be decided is whether there has been a breach of cl. 5. In my judgment, there clearly has, and for this simple reason—that the consent of the lessor to the underlease was never even asked for, so that the question whether it was given does not arise. The lessee alleges that his letter of May 15, 1947, amounts to a request for consent, but this is plainly not so; it is merely an answer to the lessor's question in the letter of May 9, 1947. The lessor's reply of May 22, 1947, states that the lessor will be satisfied with a banker's reference in the case of the proposed lessees, and this is said to be a consent to the underletting to them. This is a distortion of the letter. I am far from saying that the plaintiff expressed himself as clearly as a solicitor should, but he had not been asked to give his consent, and was not giving his mind to that subject. He was more exercised by cl. 4, which I think he misinterpreted, because that clause would not apply to an under-lessee, there being no covenant not to permit user. Nevertheless it had a very pertinent bearing on the question whether the lessor should or should not give his consent to the under-lease having regard to the business which the under-lessees were likely to carry on. I hold, therefore, that there has been a breach of both covenants.

Next comes the point raised by amendment of the defence made at the trial. It is said that the lessor, with knowledge of acts constituting the breaches, elected to affirm the lease, and therefore waived the forfeiture, and cannot now rely upon it. The facts relevant to this issue are that all the acts constituting the breaches became known to the plaintiff on September 24 or 25, 1947. This was just before the Michaelmas quarter day, and it is said by the defendants (but denied by the plaintiff) that a demand for the rent due on that day was made after September 25, 1947. That there was a demand is certain; it was made in writing, is dated September, 1947 (the day being omitted), and is addressed to the first defendant at No. 7, Richmond Grove, Bexhill-on-Sea. The plaintiff alleged in his amended reply, and sought to prove, that this demand was sent out on or about September 17, 1947. In my judgment he wholly failed to prove that point. The defendants, on the other hand, did prove to my satisfaction that this document was sent out on October 6, for it accompanied a similar demand sent to another tenant, which bears that tenant's receipt stamp of October 6, 1947. These rent demands and others were regularly made out as a matter of routine in the office of Messrs. Andrew Purves Sutton & Creery by one of their clerks, a Mr. Springet, who explained that he made out the demands and sent them upstairs to be addressed and put in envelopes whence they went into the posting tray and were stamped by another member of the staff and sent off. The question is whether a demand for rent so made operates as a waiver of the forfeiture. That a demand for rent, if made unequivocally and with knowledge and by a person authorized to make it, may waive a forfeiture does, in my judgment, appear from the judgment of Parke B. in *Doe d. Nash* v. *Birch* (1) and from the speech of Lord Wensleydale in *Croft* v. *Lumley* (2). It is true that these observations are obiter dicta, but the former of them is mentioned in Woodfall's Law of Landlord and Tenant (24th ed., at p. 926) and they appear to represent the law. The opinions, however of the judges in *Croft* v. *Lumley* (2), show that it is not the demand nor even the receipt of rent which will of themselves waive a forfeiture. These acts are merely evidence to show that the lessor has elected not to avoid the lease. The question remains quo animo was the act done. No doubt a man must be held responsible for the consequences of his acts, and the question is rather one of fact than of law, as Lord Wensleydale pointed out at the end of the hearing of *Croft* v. *Lumley* (3): see also the observations of Lord Mansfield in the case of *Doe d. Cheny* v. *Batten* (4) cited by Lord Atkinson in his speech in *Abram Steamship Co.* v. *Westville Shipping Co.* (5). Has there then in the present case been such an unequivocal act by the plaintiff affirming the existence of

(1) 1 M. & W. 402, 408.

(2) 6 H. L. C. 672, 705.

(3) Ibid. 746.

(4) (1775) 1 Cowp. 243.

(5) [1923] A. C. 773, 787.

the lease as to amount to an election to treat it as continuing after knowing of the breaches committed ? In my judgment, there has not. The demand was sent out as a routine matter, and without the plaintiff's knowledge, by a clerk who himself knew nothing of the facts, and I think that even if in some circumstances a demand for rent might amount to an election this demand did not. When a cheque was tendered for the rent on October 17, it was returned, and the rent remains unpaid subsequently to Midsummer, 1947, at which date admittedly no notice of any breach of cl. 5 had come to the lessor's knowledge. Apart, however, from this consideration, the breach of cl. 4 is a continuing breach which cannot be waived so long as it is not remedied. In my judgment, therefore, the plaintiff is entitled to forfeit the lease, as he claims to do, and the action succeeds; for the under-lease necessarily falls with the forfeiture of the head-lease.

This brings me to the counterclaim whereby both lessee and under lessees claim relief against forfeiture. It has recently been pointed out by the Lord Chief Justice in *House Property, etc., Co.* v. *James Walker Ld.* (1), that the Law of Property Act, 1925 (as amended by the Law of Property (Amendment) Act, 1929), widened the power of the court to grant relief at law against forfeiture to a breach excluded from the Act of 1881, namely, that of a covenant against assignment or underletting without consent. I am, therefore, entitled under the Acts of 1925 and 1929 to relieve the lessee against both breaches, and I have power to do so without imposing any conditions, as the case last cited shows. Nevertheless, it is an extremely strong thing to ask the court to relieve a lessee against breaches which are continuing, and which no attempt is made to remedy. The first defendant is, of course, in a difficulty here; as between himself and the second defendants he has created a perfectly good term, and is not in a position to eject them and thus to remedy, or at least to atone for the breach. He has been, however, owing to the good nature of the second defendants able to offer something in the nature of a remedy. He has agreed with the second defendants that they should (and they do in fact) offer to undertake not during the under-lease to use or suffer the premises to be used otherwise than for the already permitted businesses of surveyor and valuer, and in addition certain departments of their business of law agents. The lessee claims that, if

(1) [1948] 1 K. B. 257.

permission had been asked to under-let to Messrs. Flowerdew and they had been willing to offer the undertaking above mentioned, the lessor could not reasonably have withheld his consent to the under-lease, and he therefore suggests that he ought to be relieved against forfeiture on the analogy of the observations of Denning J. (as he then was) in *Wilson* v. *Fynn* (1). I do not accept this submission. In my judgment it would not have been unreasonable for the lessor to withhold his consent to an underletting to the second defendants even subject to the conditions named. Clause 5 of the lease shows very clearly that the lessor considered, when he granted it, that it was essential for him to retain complete control over this, the third floor of his house, and this is a matter not to be ignored notwithstanding that the proviso cannot override the Landlord and Tenant Act. Moreover cl. 4 shows that the lessor considered that the business of a surveyor and valuer was unobjectionable, but did not take the same view of other businesses. This is, after all, a small house. The demised premises are in no way separate from the rest. The only lavatory accommodation is used in common with other tenants and with the landlord, and in the circumstances, if the plaintiff had declined to give his consent, I think he could not have been overruled. I therefore hold that there is no equity in the tenant to obtain relief from the liability which he has incurred, and I refuse him relief against forfeiture.

I turn now to the second defendants, who are in a different case. This is a well-known company carrying on a varied business as process servers and law agents. Their managing director said they perform all services which a layman may do for a lawyer. They have committed no breach of cl. 4, but are nevertheless involved in the breach of cl. 5 because no consent was obtained. Jurisdiction to relieve them exists under s. 146, sub-s. 4, of the Law of Property Act, 1925. They offer an undertaking in the terms already alluded to, nobody doubts that they are of the highest respectability and responsibility, and the plaintiff paid tribute to their courtesy and consideration during the time they have been in occupation. They also offer to pay a rent increased to 350*l.* per annum. None the less, the business which they carry on is, I think, one to which a solicitor under the circumstances already related could legitimately object when carried on cheek by jowl with his own. Consent to their under-tenancy was not a mere formality and the plaintiff's letters show that he would have withheld his consent, as I have held he would have been entitled to do. In these circumstances, ought I to grant relief? It was urged upon me by the plaintiff that I ought not, and that it was still the law, notwithstanding the alteration in the tenant's position effected by the Acts of 1925 and 1929 that this was a jurisdiction to be used sparingly, and not at all where the under-lessee had been guilty of some negligence or omission. It was further pointed out that the under-lessee's solicitors were fully aware of the necessity of the head landlord's consent, and allowed their clients to go on without insisting on some proof that it had been given. This is true, and indeed their solicitor candidly admitted in the witness box that this was an omission on his part due to forgetfulness and the pressure of business. The second defendants argued that this omission ought not to be visited on them, but this was the very plea which failed in *Barrow* v. *Isaacs & Son* (1). The plaintiff also relied on the decision of the Court of Appeal in *Imray* v. *Oakshette* (2). This last case, however, proceeded on a ground not now available, namely, that the lessees could get no relief; and Parker J. in *Matthews* v. *Smallwood* (3) made the following observations: "Then, lastly, I come to the question whether "I can give relief under the Conveyancing and Law of Property "Act, 1892, against the forfeiture which has occurred. I am "not quite sure that the law regulating the circumstances "under which relief ought to be given is absolutely clear, "or quite theoretically satisfactory. Prior to the Conveyancing "Acts the only breach of covenant against which equity "relieved as a matter of course was the failure to observe "the covenant for payment of rent. In no other case did "equity relieve unless there was something additional in the "nature of accident or mistake; and it was held that careless-"ness on the part of the person claiming relief could not be "considered in a court of equity to be a mistake or accident "of a nature which would afford a ground for relief. I think "that appears from *Barrow* v. *Isaacs & Son* (1). In that case "Kay L.J. goes into the whole history of the subject and "comes to the conclusion that the principle on which relief

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(1) [1948] 2 All E. R. 40, 42.

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(1) [1891] 1 Q. B. 417, 428.

(2) [1897] 2 Q. B. 218.

(3) [1910] 1 Ch. 777, 792.

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"was given if there were accident or mistake could not be "extended to the case of carelessness, because it was precisely "one of those cases to which the maxim 'Vigilantibus non "'dormientibus leges subveniunt' ought to be applied. "There was also in the case of insurance, prior to the "Conveyancing Acts, a statute (22 & 23 Vict. c. 35, s. 4) "which provided that, though failure had been made to "observe a covenant to insure, equity might, so long as the "property had not been destroyed by fire give relief, provided "that there had been no fraud or gross negligence. That, "I think, was the condition of the law when the Conveyancing "Act, 1881, came into force. This Act provides for relief, "being given to a lessee in respect of any covenant contained "in the lease, with certain exceptions, one of which is a "breach of the covenant not to assign, under-let, or part "with the possession of the property. I do not know exactly "why that exception was introduced, but there it is; and "even now, in spite of the amending Acts, no relief can be "given to a lessee in respect of a breach of covenant against "assigning or under-letting. But with regard to the differences "between the principles adopted in giving relief before and "after the Act my attention was called to *Quilter* v. "*Mapleson* (1), a case decided almost immediately after the "Act was passed. That was a case of relief from a proviso "for re-entry for breach of a covenant to insure. When "the case came on for hearing in the court below, the Act of "1881 had not been passed, and relief was refused, as far as "I can make out, on the ground that there had been gross "negligence—that is to say, that the case was not within "22 & 23 Vict. c. 35, s. 4. When the case came on in the "Court of Appeal, the Conveyancing Act of 1881 had come "into operation, and relief was given upon appeal under that "Act. That, therefore, amounts to a decision that, in the "case of a covenant to insure, relief could be given under "the Conveyancing Act, 1881, notwithstanding that the "person who had covenanted to insure had been guilty of "gross negligence in not insuring. It would appear, therefore, "that as far as relief to a lessee under the Act of 1881 is "concerned, the question of negligence or otherwise is "immaterial. Under the Act of 1881 it was held that no relief "could be given to an under-lessee, and that led to the passing "of the Conveyancing and Law of Property Act, 1892, s. 4 "of which enables the courts to give relief to an under-lessee

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(1) (1882) 9 Q. B. D. 672.

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"in every case; not only in those cases in which they could "give relief to a lessee under the earlier statute, but also "those cases in which they could not give a lessee relief, "including the case of a covenant not to assign or under-let. "That was decided in *Imray* v. *Oakshette* (1); but a good "deal more appears to have been decided in that case. "There L. had purchased an underlease under a contract "which did not give him a right to call for the title of the "original lessee, who was bound by covenant not to assign "or under-let without licence, and he purchased with the "intention of laying out a considerable sum on the property. "The court held unanimously that L. had been guilty of "negligence in entering into a contract whereby he was "precluded from investigating the title, and that relief against "a forfeiture by the original lessee for breach of the covenant "ought not to be granted to him because of that negligence. "It would appear, therefore, that though negligence is "immaterial in respect of cases in which relief can now be "given to a lessee, yet—with regard to the covenants excepted "in the earlier Act in respect of which the court can give "relief to an under-lessee but not to a lessee—negligence is "material. Therefore, if I take that as being the law upon "the subject, I have to consider in the present case whether "there was any such negligence on the part of the trustees "of the debenture trust deed as to preclude them from having "relief under this statute. I may say that I feel myself "bound by the decision in *Imray* v. *Oakshette* (1), and though "it has been a good deal criticized by counsel, I am not sure "that the argument on which it proceeds is not sound. "Certainly the covenant against assignment and sub-letting "is placed by the two statutes, read together, in a totally "different position from that in which any other covenant "is placed by those statutes. Against forfeiture for breach "of this particular covenant no relief can be given to a lessee; "that is one of the things, and the great thing; and though "it may be given to an under-lessee, yet inasmuch as no relief "can be given to a lessee, it is not unreasonable to say that "the circumstances under which relief ought to be given "to an under-lessee must be scrutinized closely, and if the "court has power, it is a power which must be exercised "sparingly. If the power is to be exercised sparingly, I see "no reason why you should not fall back on the old principle

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(1) [1897] 2 Q. B. 218.

"of equity that the law is not for people who neglect their "own interest, but only for people who act with a view to "the protection of their own interest. Whatever may be "the theory underlying the case, it appears to me that I am "bound by it, and that I ought not to give relief against "this particular covenant unless I am satisfied that the person "who wants relief has not been guilty of any such negligence "as is referred to in this case." See also the observations of McCardie J. in *Hurd* v. *Whaley* (1).

It seems to me, therefore, that I am not fettered by authority in the grant of relief by reason of the negligence of the second defendants.

Nevertheless, I think this remains a jurisdiction to be exercised sparingly because it thrusts upon the landlord a person whom he has never accepted as tenant and creates in invitum a privity of contract between them. It appears to me that I ought only to vest the head term in the under-lessees upon the footing that they enter into covenants in all respects the same, or at least as stringent, as the covenants in the head-lease. (See *Gray* v. *Bonsall* (2).) Now this the under-lessees are not content to do; it would be useless to them; they wish to substitute for cl. 4 of the head-lease a new clause widening the purposes for which they may use the property. I am not prepared to oblige the plaintiff to put up with this, and therefore in this instance also I refuse relief.

Judgment for plaintiff.
Counterclaims dismissed.

Solicitors: *W. W. Box & Sons; Wontner and Sons; Rowe and Maw.*

(1) [1918] 1 K. B. 448, 450. (2) [1904] 1 K. B. 601, 608.

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July 6, 7, 8.

In re HOWLETT (WILLIAM HENRY), DECD.
AND
In re HOWLETT (ADA AMELIA), DECD.

HOWLETT *v.* HOWLETT.

Limitation of action—Property owned by wife under gavelkind—Death of wife intestate survived by husband and son—Son entitled absolutely subject to right of husband to half of rents and profits until death or

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HOWLETT (WILLIAM HENRY), DECD., *In re* AND HOWLETT (ADA AMELIA), DECD., *In re.* HOWLETT *v.* HOWLETT.

re-marriage—Re-marriage of husband—Continued occupation and use of property by husband—Husband trustee for son—No rent ever received or payment made by husband in respect of trust property—Death of husband seventeen years after re-marriage—Action by son against executrix for occupation rent and for account of rents and profits received by husband—Occupation of trust property by trustee for own use—Notional receipt of rent on behalf of beneficiary—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2*; sub-s.* 2 ; *s.* 19, *sub-ss.* 1 (*b*), 2.

In 1923 an intestate died survived by her husband and son and leaving property which comprised a wharf and which she had held by the custom of gavelkind. Accordingly the husband took, until he should die or re-marry, an interest in half of the rents and profits of it and subject thereto the son was entitled absolutely. In 1924 letters of administration to the wife's estate were granted to the husband who, in 1927, married the defendant but, notwithstanding that his interest thereupon ceased, occupied and used the property for his own benefit until his death in 1944. In 1945 the son obtained letters of administration to the wife's estate and in 1948 probate of the husband's estate was granted to the defendant. The son brought an action against her claiming, inter alia, a declaration that the husband, in retaining and occupying the wharf for his own use and benefit and failing to repair it, was guilty of breaches of trust and of the duty which, as administrator of the wife's estate, he owed to the son as her heir in gavelkind. Evidence was given that the son had lived with and been maintained by the husband for about eighteen months after the husband's re-marriage. The defences were, inter alia, that the husband had been—and the defendant therefore was—entitled to credit for the son's maintenance, that the husband, being, by virtue of the Land Transfer Act, 1897, only a bare trustee to transfer the assets of the estate in due course, had not been under obligation to keep the wharf in repair and that the provision, in s. 19, sub-s. 1 (*b*), of the Limitation Act, 1939, that "no period of limitation prescribed by this Act shall apply to an "action by a beneficiary under a trust . . . . (*b*) to recover "from the trustee trust property or the proceeds thereof in the "possession of . . . . or previously received by the trustee and "converted to his use" did not apply to trust property which had not been actually received by the trustee and was not in his possession when the action was brought and that the sub-section referred only to an actual and not to a notional receipt of trust funds, with the result that, since the husband had not received any rents or profits, the sub-section did not apply and the period of limitation prescribed by the Act applied to the action.

Held, (1.) that the husband was a trustee for the son ; (2.) that a trustee who, as in the present case, had occupied the trust property for himself and was therefore chargeable with an occupation rent and had notionally received the rent of the property on behalf of the beneficiary and could not discharge himself by showing that he had paid moneys away could not take advantage of s. 19, sub-s. 1 (*b*), with the result that the defence of the Statute of Limitations did not succeed; (3.) that the husband was, accordingly, accountable for a proper occupation rent less the cost of repair in respect of the whole period during the time when he went into occupation of the property, subject to a reasonable allowance for the time during which he was maintaining the plaintiff while living with him.

ACTION by the plaintiff against the estate of his father, whom he claimed to have been a trustee for him.

In 1923 the plaintiff's mother (hereinafter called "the "wife") died intestate, owning property with a wharf on it. The property was held by the custom of gavelkind, in Kent, so that the plaintiff's father (hereinafter called "the husband") took an interest in half of the rents and profits until he should die or re-marry. Subject thereto, the plaintiff, who was the heir at law, was absolutely entitled to the property.

In 1924 letters of administration to the wife's estate were granted to the husband. In 1927 he married the defendant in this action and his interest in the property ceased, but he continued to occupy and use it for his own benefit until his death on October 11, 1944. While a probate action with regard to his will was proceeding the plaintiff, in February, 1945, obtained letters of administration to the wife's estate. In December, 1945, an order was made in the Probate Division appointing an administrator pendente lite of the husband's estate and an order was made pursuant to which he handed over to the plaintiff the title deeds relating to the property. In 1948 probate of the husband's will was granted to his widow, the defendant in this action.

By the writ, which was issued on October 22, 1948, the plaintiff claimed, inter alia (1.) a declaration that the husband, in retaining and occupying the wharf for his own use and benefit and failing to repair it, was guilty of breaches of trust and of the duty which, as administrator of the wife's estate, he owed to the plaintiff as her heir in gavelkind; (2.) (*a*) a declaration that the wharf ought, for the purposes of the account in the writ mentioned, to have an annual value by way of occupation rent set on it during the husband's occupation of it from the date of the wife's death to that of the husband's death, or alternatively, an inquiry what occupation rent ought to be set on it during that period; (*b*) that the husband's estate be charged with such value in the said account; (3.) an account of the rents and profits of the wharf received by the husband during his life or by any person or persons to his use; (4.) payment of 500*l.* (increased by amendment at counsel's request to 1,000*l.*, alleged to be the loss due to depreciation caused by the husband's failure to repair the property) and of the amount found due to the plaintiff on taking the account, with interest at 5 per cent. per annum from the date of the husband's death.

The defences were, that the plaintiff had disentitled himself to relief by acquiescence, laches and delay, that the husband had been entitled to credit for the plaintiff's maintenance, that, as a bare trustee, he had not had a duty to keep the wharf in repair and that the action was barred by the Limitation Act, 1939 (1).

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(1) Limitation Act, 1939, s. 2, sub-s. 2: "An action for an "account shall not be brought "in respect of any matter which "arose more than six years "before the commencement of "the action."

Section 19, sub-s. 1: "No "period of limitation prescribed "by this Act shall apply to an "action by a beneficiary under a "trust, being an action—(*a*) in "respect of any fraud or "fraudulent breach of trust to "which a trustee was a party "or privy; or (*b*) to recover "from the trustee trust property "or the proceeds thereof in the "possession of the trustee, or "previously received by the "trustee and converted to his "use.

Sub-section 2: "Subject as "aforesaid, an action by a beneficiary to recover trust property "or in respect of any breach of "trust, not being an action for "which a period of limitation "is prescribed by any other "provision of this Act, shall not "be brought after the expiration "of six years from the date on "which the right of action "accrued . . . ."

Trustee Act, 1888, s. 8, sub-s. 1: "In any action or other proceeding against a trustee or any "person claiming through him, "except where the claim is "founded upon any fraud or "fraudulent breach of trust to "which the trustee was party "or privy, or is to recover trust "property, or the proceeds thereof still retained by the trustee, "or previously received by the "trustee and converted to his "use, the following provisions "shall apply: (*a*) All rights and "privileges conferred by any "Statute of Limitations shall be "enjoyed in like manner and to "the like extent as they would "have been enjoyed in such "action or other proceeding if "the trustee or person claiming "through him had not been a "trustee or person claiming "through him . . . ."

Land Transfer Act, 1897, s. 2, sub-s. 1: "Subject to the powers, "rights, duties and liabilities "hereinafter mentioned, the "personal representatives of a "deceased person shall hold the "real estate as trustees for the "persons by law beneficially "entitled thereto, and those persons shall have the same power "of requiring a transfer of real "estate as persons beneficially "entitled to personal estate have "power of requiring a transfer "of such personal estate."

The plaintiff gave evidence that he knew that he would be absolute owner of the property when the husband had died, but did not know that if and when the husband re-married, the husband would no longer be entitled to half the rents and profits thereof. On the point as to maintenance, evidence was given that the plaintiff did in fact live with, and was wholly maintained by, the husband for some eighteen months after the husband's re-marriage. As to repair, both sides called expert evidence on the cost of repairing the property at the date of this action, the witness for the plaintiff saying that it would be about 1,789*l.*, the witness for the defendant that it would be about 340*l.* The same expert witnesses gave evidence—again, widely differing—as to the rents proper to be received for the wharf and evidence of other matters connected with that question was also given. Thus, it was stated that the husband had used the wharf for, among other things, sailing barges and that, since it became less important to use sailing barges after 1931 than it had been before then, one of the results was that the husband made less use of the wharf than he had previously made. It was stated also that, during most of the time while the husband was using the wharf, its rateable value was no more than 35*l.* gross and 26*l.* net, and that for 10*l.* a year the husband had rented a quarter of a mile of saltings east of the wharf.

Montgomery White K.C. and *E. Blanshard Stamp* for the plaintiff. Since the husband's interest never comprised more than one-half of the rents and profits he was, as soon as he entered into possession—i.e., for practical purposes, from the date of the wife's death—and continued to be bailiff for the plaintiff and chargeable accordingly: *In re Hobbs* (1); *Wall* v. *Stanwick* (2); *Howard* v. *Earl of Shrewsbury* (3); and, from the date when he obtained administration to the wife's estate, became also express trustee for him (see Land Transfer Act, 1897, s. 2) holding the property, as from January 1, 1926, on the statutory trusts. His duty was to account for a rent which would be the best obtainable were the property in good repair (and, on the evidence, he did not account for one single penny piece). His duty as trustee, however, did not stop at his obligation to account to the plaintiff for rents and profits. It was also his duty to keep the wharf in proper repair: *In re*

(1) (1887) 36 Ch. D. 553.
(2) (1887) 34 Ch. D. 763.
(3) (1874) L. R. 17 Eq. 378.

Hotchkys (1). The necessary repairs could have been paid for out of the trust estate, but, again, the husband was just as negligent about that as about the rent. On the evidence, in the state of the law the defence of acquiescence cannot stand. The plaintiff knew that he would be absolute owner of the property when the husband died: but he does not appear to have known either why he would be, or what he was entitled to while the husband was still alive. He did not know all the facts, and did not know the consequences of any of the facts: and a defence of acquiescence cannot succeed against a plaintiff who does not know both the facts and their consequences: *Cockerell* v. *Cholmeley* (2). On the evidence and the authorities, and in the circumstances the plaintiff is entitled to the relief asked by the writ as amended.

Geoffrey Cross K.C. and *G. D. Johnston* for the defendant. On the evidence, the plaintiff knew only that he would own the property when the husband died. He did not know that he had some rights in it while the husband was alive and that he would get complete rights in it if, as happened, the husband re-married: and in these circumstances it is difficult to persist in the defence of acquiescence.

Secondly, if the husband was liable to account for anything, the cost of the plaintiff's maintenance while he was living with him ought to be set against it.

Thirdly, the husband was not liable for repair, being, by virtue of s. 2, sub-s. 1 of the Land Transfer Act, 1897, simply a bare trustee for the transfer of the assets of the estate in due course. Even if he was liable for repair, any amount of liability decided on by the court now can have no effect save to reduce pro rata the amount of occupation rent for which he is to be taken to have been liable and which, if the court so finds, the defendant, as his executrix, will have to pay. On this, the evidence of the defendant's is to be preferred to that of the plaintiff's expert witness. Certainly the amount of occupation rent is not to be minimized, although it could, indeed, be contended that, by letting the wharf fall into disrepair, the husband had reduced the amount of occupation rent which could have been obtained to practically nil: but it is not to be exaggerated either: and the almost complete cessation of the husband's use of the wharf after 1931, its low rateable value during most of the term of his occupation of

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(1) (1886) 32 Ch. D. 408, 416, 417.

(2) (1830) 1 Russ. & Myl. 418.

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it and the very moderate rent that he paid for the saltings, all indicate that the estimate of the defendant's is more reliable than that of the plaintiff's witness.

Lastly, by virtue of s. 2, sub-s. 2 of the Limitation Act, 1939, a claim for an account cannot be brought for any matter arising before October 22, 1942, i.e., six years before the writ in this action was issued on October 22, 1948. As, however, the husband died on October 11, 1944, the period in respect of which an account could be claimed could not be more than just under two years. The claim, however, is barred by the Limitation Act, 1939. Section 19, sub-s. 1 (*b*) of that Act does not apply to trust property, rents or profits which the trustee did not himself receive (and here the husband never received any rent) and which, at any rate so far as the opening words of the subsection are concerned, he had not in his possession at the date of action brought. He must have received it actually, not notionally. Here, the most that can be said against the husband is that he notionally received rent and notionally converted it: *Thorne* v. *Heard* (1).

Montgomery White K.C. and *E. Blanshard Stamp* in reply. The plain truth is that the husband, being in occupation for his own use and benefit, ought to have paid occupation rent and did not: and it ought properly to have been an occupation rent which the property would have produced had it been in a reasonably good state of repair. Even had he not been in occupation, he would still, as trustee, have been liable—as the defendant, his executrix, is now liable—to account to the plaintiff for a proper occupation rent. A trustee cannot be heard to admit that he has not done what he ought to have done and at the same time plead that the omission was more than six years before action brought: *In re Hyatt* (2). All that the husband ever did from start to finish was to occupy the property for his own use and benefit. Not having paid occupation rent, he is to be deemed improperly to have kept it: *Toates* v. *Toates* (3). Therefore the defendant, as his executrix, still has it and cannot plead the statute.

DANCKWERTS J. The contention for the plaintiff is that the husband, having entered into possession of the property, was bailiff for the plaintiff, and became chargeable accordingly. In support of that proposition, Mr. Montgomery White cited

(1) [1894] 1 Ch. 599, 606.
(2) (1888) 38 Ch. D. 609.
(3) [1926] 2 K. B. 30.

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In re Hobbs (1), *Wall* v. *Stanwick* (2), and *Howard* v. *Earl of Shrewsbury* (3).

Those authorities establish, I think, the following propositions: First, the husband was chargeable as bailiff for the plaintiff by reason of his occupation of the property; secondly, he was entitled to take credit for the maintenance of the plaintiff so long as he resided with him. Evidence was given on that point. It appears that the plaintiff continued to reside with the husband until about July, 1928—that is to say, for about eighteen months after the husband's re-marriage—and then he went to live with a sister, and lived at various other places but did not go back to the husband again. Thirdly, having come into the position of bailiff for the plaintiff, the husband could not divest himself of the character in which he held the property.

It was also submitted for the plaintiff that by virtue of s. 2 of the Land Transfer Act, 1897, when the husband became the administrator of the wife's estate, he became an express trustee for the plaintiff.

Mr. Johnston submitted for the defendant, that the husband was only a bare trustee by virtue of that Act for the purpose of transferring the assets of the estate in due course, but I was not satisfied by Mr. Johnston's argument, and it seems to me that the husband was in the position of trustee apart from being in the character of bailiff for the plaintiff by virtue of s. 2 of the Land Transfer Act, 1897.

On January 1, 1926, the legal estate in the property was vested in the husband in his capacity of administrator, and the beneficial interests were divided between himself and the plaintiff. Accordingly, Part IV, sch. I to the Law of Property Act, 1925, para. 1 (1.) applied and made him a trustee for sale, possibly on the statutory trusts in s. 35 of that Act, but I think that that really makes no difference. It is quite possible that he merely continued to hold in the character of personal representative.

The defences, as I understood them, were in substance four. First, it was contended and pleaded that the plaintiff was disentitled to the relief claimed by virtue of his acquiescence, laches and delay. Secondly, there was the claim that in any case the husband, and therefore the defendant, was entitled to credit for maintenance of the plaintiff by the husband,

(1) 36 Ch. D. 553.
(2) 34 Ch. D. 763.
(3) L. R. 17 Eq. 378.

while the plaintiff resided with him. Thirdly, it was contended that there was no obligation on the husband to keep the wharf in repair; and fourthly, there was the defence based on the Statute of Limitations, that is to say, the Limitation Act, 1939.

As to the first defence—that is, of acquiescence, laches and delay—I was referred, on behalf of the plaintiff, to *Cockerell* v. *Cholmeley* (1), as authority for the proposition that in order to found a defence of acquiescence the party against whom the plea is raised must know not only the facts but also the consequences. This seems to me to be substantially correct. The plaintiff gave evidence, and it was reasonably clear to me from his evidence that, while he understood that on the husband's death he would come into ownership of the wharf he never really understood his rights during the husband's lifetime, and evidently did not understand (as, indeed, I think a number of other persons concerned with the case did not understand) that the husband was entitled to half the rents and profits only until his re-marriage, and that on his re-marriage he was disentitled to receive them any longer. Accordingly, in my judgment, the defence of acquiescence fails; and I think that Mr. Cross really accepted that, in view of the evidence, he could not seriously press it.

As to maintenance, it appears to me that, if and so far as I hold that the defendant is accountable in respect of the husband's occupation of the property in any respect during the period during which the plaintiff lived with the husband, the husband is entitled to credit for a reasonable sum for maintenance, and therefore to that extent that defence will be available.

As to keeping in repair, Mr. Montgomery White cited *In re Hotchkys* (2), where there is stated a proposition which, in general terms, is indisputable. Cotton L.J. says: "In "my opinion, in a case where trustees have property vested "in them under circumstances like these, there is an obligation "upon them, for the purpose of properly carrying out and "performing their trust with regard to the property, to see "that the property does not fall into decay from want of "proper repair."

Actually, however, the position of trustees with regard to their obligations to repair trust property is, in my view, far from clear and settled, and *In re Hotchkys* (2) is generally cited,

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(1) 1 Russ. & Myl. 418.

(2) 32 Ch. D. 408, 416, 417.

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I think, on the question how far repairs should fall on capital or on income. It does not follow that, because trust property is kept in its proper state of repair, the cost of repairs necessarily comes out of income: it may be that it ought to come out of capital.

Mr. Cross contended that in any case the question only affected the amount of the occupation rent which might be charged against the husband, that is to say the trustee, and in my opinion there is a good deal to be said for that view.

As to the actual cost now of repairing the property, which has quite obviously fallen into a serious condition of decay, there was a great conflict between the evidence of the experts. Mr. Hull, an expert on barge wharves and like property, was a most satisfactory witness and gave his evidence very well. He has produced a written estimate which puts the amount required at 1,726*l.*; and the details which he gave in evidence raised the figure to 1,789*l.* Mr. Lucas, the defendant's expert, who, while a surveyor with considerable experience in regard to the letting and possibly the management of property, has, I think, not any special knowledge of barge-repairing wharves, which is the kind of wharf that this one is, gave evidence and produced a very different figure indeed—about 340*l* if I remember correctly. Be that as it may, I do not propose to decide the figure which would be needed to put this barge-repairing wharf back into the state of repair in which it may have been when the wife died, or at any other date. On the view of the case which I propose to take I shall not have to decide that.

The fourth and last defence is based on the Limitation Act, 1939. Section 2, sub-s. 2 of the Limitation Act, 1939, provides that "an action for an account shall not be brought in "respect of any matter which arose more than six years before "the commencement of the action," and this action, of course, was begun when the writ was issued, on October 22, 1948.

It is also well to remember that the husband died on October 11, 1944, and that therefore, under the Statute of Limitations, the period during which a claim could be made for an account would appear to be between October 22, 1942, and October 11, 1944—about two years. There is, however, in the Limitation Act, 1939, a part headed "Limitation of "actions in respect of trust property," which includes s. 19.

Mr. Cross, for the defendant, based an argument on the express terms of s. 19, sub-s. 1 (*b*). He said that it had no application to any trust property or rents or profits which were not actually received by the trustee in question and which the trustee had not in fact, so far as the first part of the sub-section is concerned, in his possession at the date when the action was brought. He referred me to a case decided on s. 8 of the Trustee Act, 1888, which was not in precisely the same terms—s. 8 of the Trustee Act, 1888, uses slightly different language. I do not quite know why the change was made when the Limitation Act, 1939, was passed, but the exception appearing in s. 8 is, "where the claim is founded "upon any fraud . . . . or is to recover trust property, or "the proceeds thereof still retained by the trustee, or previously "received by the trustee and converted to his use." Probably the difference is without substance and is merely a difference of wording: but still there is that slight change in the wording of the sub-section.

In support of his proposition, Mr. Cross pointed out that there was no evidence whatever of any receipt by the husband of any rent in fact, which seems plain on the evidence. He submitted that the section refers to an actual and not a notional receipt of any trust funds, and for that he cited *Thorne* v. *Heard* (1). In that case, mortgagees, on selling property, employed a solicitor (very naturally) to complete the transaction, and the solicitor received more money than was required to discharge principal, interest and costs: and, instead of accounting either to them or to the borrower, who would be entitled to any surplus, the solicitor put the money in his pocket. Primarily, the trustees were chargeable with the money which their solicitor had obtained, but in that case they were able to discharge themselves under the Trustee Act, 1888, because, by allowing the solicitor (quite unknowingly on their part, I think) to retain the moneys in question, they had put themselves in a situation equivalent to the one in which they would have been had they paid over moneys properly received by them as trustees to the solicitor, and he was able to spend them for his own purposes. In other words, they had received the trust money but they did not still retain it and they had not converted it to their own use. Accordingly, the exception in the Act did not apply and the trustees had a defence under the Trustee Act, 1888.

In the present case, Mr. Montgomery White, in reply on this point—which seems to me to be a very vital point in the case—referred me to certain authorities. He said first, that the husband could not be heard to say that he did not receive any rents as he was in occupation, and for that proposition he cited *Toates* v. *Toates* (1). I do not think that that case helps me very much, because all that it really decided was that, for the purposes of the Statute of Limitations, under the Land Transfer Act, 1897, a personal representative is an express trustee: it did not really affect the point which I have to decide.

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(1) [1894] 1 Ch. 599, 606.

Mr. Montgomery White also submitted that a trustee cannot be allowed to plead his own devastavit or set up his own wrong in his defence, and he cited *In re Hyatt* (2). That case, again, does not afford me any assistance, because it was decided before the Trustee Act, 1888, and so the precise point that I have to consider really did not come to be dealt with in that case either.

There is, however, in my view, force in Mr. Montgomery White's contention that a trustee who remains in occupation of trust property for his own purposes—and undoubtedly, I think, the husband did so remain—cannot be heard to say that he has not received any rents or profits in respect of the property. Having received, therefore, in theory rents and profits, because he is chargeable with an occupation rent, he cannot discharge himself unless he can show that he has paid moneys away and therefore either discharge himself by proper payments or, indeed, perhaps escape under the Limitation Act having made improper payments. But here the trustee, it seems, did not make any payments out of any kind at all. He merely used the property for his own purposes, and I think the submission of Mr. Montgomery White is justified, that, having received the occupation rent, for which he is chargeable, he must be considered as still having it in his own pocket at the material date and therefore cannot escape under the provisions of the Limitation Act, 1939.

There remains, of course, the question, what is the proper amount for which he should be chargeable? In my view, the amount which he is to be taken to have received should be reduced by what would be the proper amount to pay out of the annual rents in this case for ordinary current repairs of the property. In other words, there is some force in Mr. Cross's submission, that the question of repairs does affect the amount for which the defendant, as representing the husband, is accountable.

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(1) [1926] 2 K. B. 30.

(2) 38 Ch. D. 609.

As to the rents proper to be received in respect of this particular property there was a tremendous variation between the estimates of Mr. Hull for the plaintiff and those of Mr. Lucas for the defendant. On this question I cannot accept Mr. Hull's evidence with the same confidence that I could on the question of the repair of the property, and as against that there are certain other factors which do afford a check. Mr. Cross submitted that one check was that the husband himself ceased to make any substantial use after 1931. There is something to be said for that, because it appears that about 1931 the use of sailing barges, which was one of the purposes for which the husband used the wharf, ceased to be of the same importance as it had been before, so that the need for the repair of the wharf for that purpose was largely reduced. Secondly, there is the check provided by the rateable value of the property, which was as low, apparently, for most of the period in question, as 35*l.* gross and 26*l.* net. The third point taken by Mr. Cross was that the husband had been able to rent a quarter of a mile of saltings to the east of the property for as low as 10*l.* a year. I was little impressed by that, because that was really simply property "in the raw," so to speak, and not very relevant to the question what rent a made-up wharf of that kind, however "made-up" it might be, would be able to command.

I propose to deal with the matter on rather a broad basis, because there are many imponderable circumstances, or circumstances not wholly clear. For instance, I do not think that the defendant, as representing the husband, is entitled to say that the rent would be reduced to nothing because the husband failed to keep the property in repair at all. One must, I think, take, over the whole period, the reasonable rent which the property, kept in a proper state of repair, would have brought in as income which would have been available, had the husband been charged with a proper occupation rent, and would suffice to keep it up in that state.

I must, I think, deal first with the Statute of Limitations. On section 19 of the Limitation Act, 1939, I take the view that a trustee who has occupied the trust property for himself and is therefore chargeable with an occupation rent and therefore notionally has received the rent of the property on behalf of the beneficiary, and who cannot discharge himself by showing any contra payments, cannot take advantage of s. 19, sub-s. 1 (*b*), and that therefore the defence of the Statute of Limitations does not succeed.

Accordingly, prima facie, the husband was accountable for a proper occupation rent less the cost of repair in respect of the whole period during the time when he went into occupation of the property. That is subject to a reasonable allowance for the period during which he was maintaining the plaintiff while he was residing with him. I propose to treat the maintenance during the period throughout which the plaintiff resided with the husband as absorbing the plaintiff's share of any rents and, as he grew older, the whole, after the husband's half-interest ceased on his re-marriage.

That brings me down, at any rate, to July, 1928. I think that perhaps there might well be further expenses, and it would not be unreasonable, therefore, to take the period during which the rent is to be accounted for as being coincident with the date of the husband's death, that is to say October 11, 1944. Therefore I propose to hold the defendant as chargeable for an annual amount beginning on October 11, 1928, and ceasing on October 11, 1944. I do not suggest that the way in which I am reaching the figure or the precise period is wholly scientific, but it seems to me that it is a fair estimation of what ought to be paid. The figure which I propose to take over the whole of that period from 1928 to 1944, about 16 years, as occupation rent, less the cost of current repairs, will be 100*l.* a year. Accordingly, there will be 1,600*l.* for which the defendant must account.

I propose to declare that the husband in retaining for his own use and benefit and using and occupying the wharf was guilty of breaches of trust and of the duty which he as administrator of the wife's estate owed to the plaintiff as her heir in gavelkind.

I do not propose to make a declaration as asked by para. 2—that account need not be directed in view of the course which I have taken—and there will be an order for payment of 1,600*l.* in respect of the occupation rent by the defendant, as executrix to the plaintiff.

Declaration and order accordingly.

Solicitors: *Warren & Warren, Keene, Marsland & Co.*

K. R. A. H.

END OF VOL. AND OF CHANCERY SERIES FOR 1949.

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2. —— *Debt to bookmaker—Specially indorsed writ—Apparent consideration for debt —Debtor's petition in bankruptcy to avoid claim—Receiving order and adjudication—Refusal of registrar of county court to rescind order and annul adjudication—" Abuse of " process of court—Present or prospective liability of debtor—Bankruptcy Act*, 1914 (4 & 5 *Geo*. 5, *c*. 59), *s*. 29.
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3. —— *Judgment debt — Garnishee summons for payment—Payment of amount into county court by garnishee—No consent by debtor to payment out to creditor—Order for payment out on application by creditor—Successive requests to county court officers to pay out—Failure by them to pay out owing to administrative breakdown—Receiving order against debtor's estate—Instructions by official receiver to officers of county court office to retain moneys—" Attachment of a debt "— " Receipt of the debt "—Bankruptcy Act*, 1914 (4 & 5 *Geo*. 5, *c*. 59), *s*. 40, *sub-ss*. 1, 2; *s*. 41, *sub-s*. 1.
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4. —— *Lease of hotel coupled with sale of goodwill and contents — No consent to lease by building society mortgagee of hotel as required by mortgage—Fraud on tenants by lessor—No payment of rent by tenants—Bankruptcy of lessor—Action by tenants for fraud — Judgment in action for damages to be*

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2. —— *Charitable purposes—Fund created to strengthen bonds of unity between South Africa and the Mother Country —To appease racial feeling between sections of South African community—Trust for benefit of community—Trustees' discretion to apply funds towards political or other non-charitable objects—Invalidity.*
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3. —— *See* WILL.

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COAL — *Nationalization — Computation of interim income—Colliery company making up quarterly accounts—" Last complete accounting " period "—Coal Industry Nationalisation Act*, 1946 (9 & 10 *Geo*. 6, *c*. 59), *s*. 22, *sub-s*. 3 (*c*).
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COMPANY — *Charge — Omission to register — Application for extension of time for registration—Form of order—Companies Act*, 1948 (11 & 12 *Geo*. 6, *c*. 38), *s*. 101.
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2. —— *Debenture holders' action — Receiver —Bailment—Claim by two parties on separate summonses—Summonses heard together—Res judicata against one party in respect of furniture claimed by other party—Claim by receiver to property—Duty of receiver as officer of the court.*
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3. —— *No power in articles to increase capital—Moneys arising from realization of capital assets—Resolution to distribute among members " on footing that they receive same as " capital "—Payment to trustees of settlement of sum attributable to settled shares—Whether income or capital.*
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4. —— *Offer by a company to acquire shares of another company—Acceptance by more than nine-tenths of the latter's shareholders —Application by dissenting shareholders not to have their shares taken over—Whether unfair offer—Companies Act*, 1948 (11 & 12 *Geo*. 6, *c*. 38), *s*. 209.
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5. —— *Transfer of shares—Article purporting to transfer shares on death—Validity—Companies Act*, 1929 (19 & 20 *Geo*. 5, *c*. 23), *s*. 63.
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2. —— *War damage — Temporary wor*
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2. —— *Will — Application prior to gra*
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3. —— *See* HUSBAND AND WIFE.

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HUSBAND AND WIFE — *Maintenance of children—Maintenance order against husband in respect of child—Paternity disputed—Period of gestation—Evidence of maturity from hospital records—Guardianship of Infants Act,* 1886 (49 & 50 *Vict., c.* 27), *s.* 5—*Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7.
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2. —— *Maintenance order — Arrears — No claim against estate of deceased husband—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict., c.* 39), *s.* 9.
Family provision—Statutory time limit for making application—Letters of administration granted—Revocation on discovery of will—Probate—Application made within six months of probate but not of letters of administration—"Representation . . . . to the testator's estate " . . . . first taken out"—Summons within time limit—Inheritance (Family Provision) Act, 1938 (1 & 2 *Geo.* 6, *c.* 45), *s.* 2, *sub-s.* 1.
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INFANTS—*Proceedings heard in chambers—Wards of Court—Liberty to mother to take infants out of jurisdiction to Montreal—Proceedings started by father before competent court in Montreal—Paragraph in London newspaper stating writ of habeas corpus issued in Montreal and making inaccurate statement of proceedings in English court—Application by mother for leave to issue writ of attachment against editor—Information in paragraph supplied by reputable news-agency and passed by night editor of newspaper unaware at time of proceedings in English court.*
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INTERNATIONAL LAW—*Bar gold—Looted by Germans—Recovered by Allies—Account opened at Bank of England by United Kingdom and two foreign powers for disposal of gold looted by Germans—Deposit of gold bars at Bank of England for safe custody—Action against Bank for recovery of gold bars—Motion by Bank to set aside writ—Impleading foreign sovereign state—Doctrine of immunity.*
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LANDLORD AND TENANT — *Affirmative covenant "to use" demised premises between "9 a.m. and 6 p.m. . . . . as offices in con-"nexion with lessee's business . . . . of a "surveyor and for residential purposes"—Negative covenant "not to . . . . underlet or "part with possession . . . . without written "consent (not to be unreasonably withheld) of*

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"lessor"—Proviso that lessor might withhold consent if in his opinion proposed . . . . under-lessee was for any reason in his absolute discretion undesirable as occupant . . . . or under-lessee—Effect of covenants—Breaches by lessee of both covenants—Sub-letting without consent to law agents and stationers—Covenant in sub-lease to "use as offices in connexion "with" that business—Forfeiture—No waiver where rent demanded after knowledge of breaches but without intention to waive breaches—Counterclaims by lessee and sub-lessee respectively for relief from forfeiture—Principles applicable in exercising discretion—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-ss.* 2, 4.
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2. —— *Covenant not to assign without landlord's consent—Consent not to be unreasonably withheld—Landlord refuses leave to assign last twelve days of term—Landlord wishes to prevent proposed assignee from obtaining a tenancy protected by Rent Restriction Acts—Refusal reasonable.*
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3. —— *Forfeiture — Breach of covenant—Club — Conviction for gaming—Capable of remedy—Relief against forfeiture—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-s.* 1.
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4. —— *Lease — Covenant by tenant not to assign without consent—"Tenant" expressed to include successors in title—Bankruptcy of tenant—Devolution of lease on trustee—Trustee a successor in title.*
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5. —— *See* Mortgage; Vendor and Purchaser.

LEGACY DUTY. *See* Will.

LIMITATION OF ACTION — *Property owned by wife under gavelkind—Death of wife intestate survived by husband and son—Son entitled absolutely subject to right of husband to half of rents and profits until death or re-marriage — Re-marriage of husband — Continued occupation and use of property by husband—Husband trustee for son—No rent ever received or payment made by husband in respect of trust property—Death of husband seventeen years after re-marriage—Action by son against executrix for occupation rent and for account of rents and profits received by husband—Occupation of trust property by trustee for own use—Notional receipt of rent*

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on behalf of beneficiary—Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 2; *s.* 19, *sub-ss.* 1 (*b*), 2.
In re HOWLETT (WILLIAM HENRY), DECD. AND *In re* HOWLETT (ADA AMELIA), DECD. HOWLETT *v.* HOWLETT - **Danckwerts J. 767**

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In re TRUSTS AFFECTING COMPENSATION MONEYS IN RESPECT OF COAL HOLDINGS. PUBLIC TRUSTEE *v.* MANCHESTER CORPORATION - - - - **Danckwerts J. 737**

2. —— *Compulsory acquisition — Compound settlement — Freehold interests in coal —Compulsory acquisition thereof—Disposal of compensation moneys as between successive tenants for life and remaindermen—Provision under Settled Land Act,* 1925, *s.* 47, *for setting aside as capital one-fourth of rents received from mining leases—Coal Act,* 1938 (1 & 2 *Geo.* 6, *c.* 52), *sch. III., Part IV., para.* 21 (2).
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MORTGAGE — *Originating summons taken out by mortgage for delivery of possession— Trespasser in occupation—Whether procedure by originating summons applicable—R. S. C. Or.* 55, *r.* 5A.
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2. —— *Statutory power of leasing excluded —Mortgagor purports to grant tenancy—Right of mortgagee to possession as against tenant— Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 99, *sub-s.* 1.

MORTGAGE—*continued.*

Landlord and tenant—Rent restriction— Tenancy granted by mortgagor—Tenancy no binding on mortgagee—Mortgagee not landlor of tenant—Tenant not protected—Increase o Rent and Mortgage Interest (Restrictions) Ac 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f and* (*g*)*—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 2 *Geo.* 5, *c.* 32), *s.* 3, *sch. I.*
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SELIGMAN *v.* DOCKER **Romer J. 5**

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In re HAMBRO'S MARRIAGE SETTLEMENTS HAMBRO AND ANOTHER *v.* HAMBRO AN OTHERS - - **Roxburgh J. 11**

2. —— *Defective execution — Joint powe to spouses and survivor to appoint to issue o marriage with or without power of revocation— Joint appointment reserving power of revocation by deed to survivor—Survivor appoints b will—No implied revocation.*
In re HAMBRO'S MARRIAGE SETTLEMENTS HAMBRO *v.* HAMBRO - - **C. A. 48**

3. —— *See* SETTLEMENT.

PRACTICE — *Crown proceedings — Joinde of Crown as defendant—Estate duty—Application for determination prior to possibl incidence—Whether trustees accountable— Application by Crown to be struck out a defendant—Hypothetical future question n determinable by court—Finance Act,* 189 (57 & 58 *Vict., c.* 30), *s.* 8*—Finance Ac* 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 43*—Crow Proceedings Act,* 1947 (10 & 11 *Geo.* 6, *c.* 44 *ss.* 1, 13, 17, *sub-s.* 3, 23*—R. S. C.* 188 *Or.* 1A, *r.* 1 (*a*) (*b*); *Or.* 16, *r.* 11; *Or.* 55 *rr.* 3, 5.
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2. —— *Crown proceedings — Originatin summons—Joinder of Crown as defendan —Application by Crown to be struck out a improperly joined—Estate duty—Determina*

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tion prior to incidence—Whether trustees accountable — Crown Proceedings Act, 1947 (10 & 11 *Geo.* 6, *c.* 44), *ss.* 1, 13, 17, *sub-s.* 3; *s.* 23—*Administration of Justice (Miscellaneous Provisions) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 3—*Finance Act,* 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 43—*Finance Act,* 1894 (57 & 58 *Vict., c.* 30), *s.* 8—*Rules of the Supreme Court,* 1883, *Or.* 1A, *r.* 1 (*a*), (*b*); *Or.* 16, *r.* 11; *Or.* 54A, *r.* 1A; *Or.* 55, *rr.* 3, 5.
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RAILWAY COMPANY — *Level crossing — Company authorized to construct railway above level of highway—Highway raised on inclined planes to cross railway—Mining operations cause railway and highway to sink—Railway rebuilt on original level—No duty on railway company to raise level of highway—South Yorkshire, Doncaster and Goole Railway (Deviation and Extension of Elsecar Branch) Act,* 1850 (13 & 14 *Vict., c.* xxxv), *ss.* 3, 8, 13—*Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict., c.* 20), *s.* 16.
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RECTIFICATION — *Deed of covenant—Payment to be "free of tax"—Mistake of Law—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40) *General Rules, r.* 23, *sub-r.* 4.
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REVENUE — *Estate duty — Company's shares—Basis of valuation—Profits made after deceased's death—Whether provision for income tax deductible — "Liabilities of the "company" — Meaning — Finance Act,* 1940 (2 & 3 *Geo.* 6, *c.* 29), *s.* 50, *sub-s.* 1; *s.* 55, *sub-s.* 2.
In re DUFFY. LAKEMAN *v.* ATTORNEY-GENERAL - - - - - **C. A. 28**

2. —— *Voluntary payment of purchase tax—Tax held not to be leviable—Claim for repayment—Conditions of payment and acceptance—Money paid under mistake of law—Right of Crown to raise that defence—Crown Proceedings Act,* 1947 (10 & 11 *Geo.* 6, *c.* 44), *s.* 21.
SEBEL PRODUCTS, LD. *v.* COMMISSIONERS OF CUSTOMS AND EXCISE **Vaisey J. 409**

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ROAD TRAFFIC — *Public authority — British Transport Commission — London Transport Executive agent for Commission to exercise functions delegated to Executive by or under scheme made by Commission and approved by Minister—Scheme of delegation of functions sealed by Commission and approved by Minister in December,* 1947—*Vesting of undertaking of London Passenger Transport Board in Commission on January* 1, 1948—*Motor omnibus service along route not within "special area" as defined by London Passenger Transport Act,* 1933 (23 *Geo.* 5, *c.* 14), *started by Executive in* 1948—*Powers of Executive—Transport Act,* 1947 (10 & 11 *Geo.* 6, *c.* 49), *s.* 2, *sub-s.* 1; *s.* 12, *s.* 14 *sub-s.* 4; *s.* 65, *sub-s.* 1.
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2. —— *Life interest — Remainder "upon "trust for all the children of the settlor . . . . "other than an eldest son . . . . entitled for "the time being under [the settlor's] will to "his real estates for . . . . life"—Eldest son's succession to real estates—Death of eldest son before tenant for life under settlement—Whether excluded.*
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3. —— *Special power of appointment — General appointment by will "Give devise and "appoint all my property"—Inclusion of persons not objects of the power—Validity and extent of appointment.*
In re LATTA'S MARRIAGE SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* LATTA AND ANOTHER - - - **Vaisey J. 490**

4. —— *Trusts of four funds for three daughters and a son—Trust for son absolutely on attaining age of thirty years—Accruer clause—Accruer of fund the trusts whereof "shall fail or determine" to the other or "others of which the trusts . . . . shall not "then have failed or determined"—Payment of fund to son on attaining thirty years of age—Death of son—Subsequent death of a daughter a spinster—Accruer of daughter's fund.*
In re HUNTINGTON'S SETTLEMENT TRUSTS. STRUTHERS *v.* MAYNE AND OTHERS.
Jenkins J. 414

TOWN AND COUNTRY PLANNING — *Local authority—Land zoned as green belt—Permission to build refused—Whether refusal on ground that land required as "public open "space"—Town and Country Planning Act,* 1932 (22 & 23 *Geo.* 5, *c.* 48), *s.* 10, *sub-s.* 6.

TOWN AND COUNTRY PLANNING—*continued.*

EPSOM AND EWELL CORPORATION *v.* STREATHAM PROPERTY INVESTMENT LIMITED **Vaisey J. 38**

2. —— *See* LOCAL GOVERNMENT.

TRADE MARK—*Foreign company—Trade mark registered in England—Sale of milking machines stamped with mark—Export to England rendered impossible by war conditions—Non-user of mark for five years—Application to expunge the mark—Non-user due to " special circumstances in the trade "—Trade Marks Act*, 1938 (1 & 2 *Geo.* 6, *c.* 22), *s.* 26, *sub-s.* 1 (*b*), *sub-s.* 3.

AKTIEBOLAGET MANUS *v.* R. J. FULLWOOD & BLAND, LD. - - - **C. A. 208**

TRUST—*Joint account—Money paid by deceased into joint accounts in names of herself and defendant—Survivorship—Defendant's right to beneficial interest—Whether invalid testamentary disposition.*

YOUNG AND ANOTHER *v.* SEALEY **Romer J. 278**

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VENDOR AND PURCHASER — *Sale of building estate—Successive completion by parcels—Part performance—Purchaser unable to complete — Repudiation — Damages for breach of contract—Rescission.*

THORPE *v.* FASEY - **Wynn-Parry J. 649**

2. —— *Sale of requisitioned property by auction—Statement in particulars of sale " War Damage. Any sums to be received " as compensation from the requisite government departments shall belong and be paid to " the vendor "—De-requisitioning of property subsequently to sale—No damage to property by enemy action—Amount of compensation payable under s.* 2, *sub-s.* 1 (*b*) *of Compensation (Defence) Act*, 1939, *agreed between vendor, purchaser and War Department's land agent—" Compensation "—" War Damage " —Compensation (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*b*).

In re ARMITAGE'S CONTRACT. ARMITAGE *v.* INKPEN - - - **Vaisey J. 666**

3. —— *Tenancy agreement — Option in agreement to tenant to purchase freehold subject of giving landlord three months' notice—Death of landlord—Notice by tenant to landlord's personal representative of intention to exercise option—Validity of notice.*

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In re CITY OF LONDON PROPERTY CO., LD.'S APPEAL - - **Vaisey J. 581**

2. *See* VENDOR AND PURCHASER.

WILL — *Bequest of " all my bloodstock " — Whether half share in a colt passes—Whether part interest in a stallion passes.*

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In re GILLSON, DECD. ELLIS *v.* LEADER **C. A. 99**

2. —— *Bequest of sum to pay specified annuity—Previous covenant by testator to pay annuity of same amount to same person—Direction in will to pay just debts—Satisfaction —Bequest in will not in satisfaction of contractual liability.*

In re MANNERS. PUBLIC TRUSTEE *v.* MANNERS AND OTHERS - **C. A. 613**

3. —— *Codicils — Bequest with restraint on anticipation in will executed in* 1932—*Codicils executed in* 1937 *confirming will—Abolition of restraint after January* 1, 1936—*" Instrument executed after January* 1, 1936 *" — Republication — Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 2, *sub-s.* 2.

In re HEATH'S WILL'S TRUSTS. HAMILTON *v.* LLOYDS BANK LIMITED **Harman J. 170**

4. —— *Construction — Bequest of shares in private companies—Specific or general—Total holdings bequeathed—Gift of shares " if such " shares have not been transferred to him " previously to my death "—Shares not registered at testator's death—Ademption.*

In re ROSE. MIDLAND BANK EXECUTOR AND TRUSTEE CO., LD. *v.* ROSE **Roxburgh J. 78**

5. —— *Construction — Bequest " to my " trustees they well knowing my wishes concerning the same " — Testator's orally expressed intention that trustees should take beneficially.*

In re REES' WILL TRUSTS. WILLIAMS *v.* HOPKINS - - - **Vaisey J. 541**

6. —— *Construction — Contingency — Gift over in event of testator's uncle dying in lifetime of testator's mother—Testator's mother died before his uncle, but both predeceased testator—Whether gift over effective.*

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7. —— *Construction — Devises and bequests to named son and granddaughter of husband by first wife describing them as " my son " and*

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8. —— *Construction — Division per stirpes or per capita — Direction that “my trustees “shall pay and divide my residuary estate “into and equally between the daughters of my “late brother S. and to E. the daughter of my “sister.”*
In re Jeeves. Morris-Williams *v.* Haylett - - - **Vaisey J. 49**

9. —— *Construction — Forfeiture on alienation — Beneficiary's marriage settlement —Covenant to transfer part of interest under will to settlement trustees — Equitable assignment—Effect of forfeiture clause.*
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12. —— *Devise and bequest in trust for testator's daughter's “child P. and any other “child or children . . . .” of daughter—Daughter married but, to testator's knowledge, unable to have children—Two children adopted by testator's daughter and her husband and treated by testator as his grandchildren—Expression “children” in English will—Intention of testator—Adoption of Children Act,* 1926 (16 & 17 *Geo.* 5, *c.* 29), *s.* 5, *sub-s.* 2.
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20. —— *Rule against double portions—Provision in will for son to take over testator's farms and live and dead stock—Intervention of War Agricultural Committee—Consequential gift to son inter vivos of live and dead stock—Whether rule applicable.*
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22. —— *Trust for sale and conversion —Investment of proceeds of sale in the purchase of land—Investment of proceeds of sale in securities—Investment in purchase of land when proceeds of sale already invested in securities can be traced—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 1.
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See also FAMILY PROVISION.

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